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# Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women

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# TANGLED UP IN KNOTS: HOW CONTINUED FEDERAL JURISDICTION OVER SEXUAL PREDATORS ON INDIAN RESERVATIONS HOBBLES EFFECTIVE LAW ENFORCEMENT TO THE DETRIMENT OF INDIAN WOMEN

Suzianne D. Painter-Thorne*

## INTRODUCTION

In February 2003, twenty-year-old Leslie Ironroad lapsed into a coma and died after being held captive in a bathroom, then beaten and repeatedly raped by a group of men on the Standing Rock Sioux Reservation in South Dakota.[1] Desperate to stop the assault, Ironroad had taken diabetes pills she found in the bathroom's medicine cabinet, hoping that the men would stop their assault if she became unconscious.[2] Later, from her hospital bed, Ironroad described her attack to a police officer.[3] She named her assailants.[4] She named witnesses to the attack.[5] Black and

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1. *All Things Considered: Rape Cases on Indian Lands Go Uninvestigated* (NPR radio broadcast July 25, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12203114 [hereinafter *Rape Cases Go Uninvestigated*].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

blue with bruises, she handwrote her statement.[6] After her death, her rape was never investigated.[7] Her assailants were never questioned.[8] No one was prosecuted.[9]

After Ironroad's death, the Bureau of Indian Affairs (BIA) police chief responsible for investigating crimes at Standing Rock explained the lack of investigation on an inability to substantiate the rape.[10] Although Ironroad had written out her own statement and had been interviewed by a BIA officer, the BIA chief contended that the rape had not been reported.[11] Nonetheless, four years later, reporters from National Public Radio were able to piece together the story of what happened to Ironroad that February night by examining Ironroad's hospital records and by interviewing hospital employees, police, medical examiners, and other people familiar with her case.[12] In one of those interviews, Doug Wilkinson, the BIA officer who took Ironroad's statement, explained why many sexual assault cases occurring on the reservation were not investigated.[13] According to Wilkinson, he was overworked and could not possibly keep up with all of the rapes, sexual assaults, and child abuse cases reported each week at Standing Rock.[14] Instead, forced to triage cases, only those cases where a suspect confessed were referred to the U.S. Attorneys' Office for prosecution.[15] Other cases were forgotten—at least by law enforcement, if not by the victims or their communities.[16]

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ("I looked back and there was nothing that could substantiate that happening. I'm sure she passed away, but as far as her being involved as a victim of sexual assault, I couldn't find anything to support that . . . . You know, if a person doesn't report, then how can we investigate it, if we don't know about it?").
12. *Id.*
13. *Id.* For further examples of the failure to investigate these crimes, see also AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), *available at* http://www.amnestyusa.org/women/maze/report.pdf [hereinafter MAZE OF INJUSTICE]; *Bill Moyers Journal* (PBS television broadcast Nov. 14, 2008), *available at* http://www.pbs.org/moyers/journal/11142008/transcript2.html; Michael Riley, *Lawless Lands: Promises, Justice Broken*, DENV. POST, Nov. 11, 2007, at A1 [hereinafter *Justice Broken*].
14. *Rape Cases Go Uninvestigated*, *supra* note 1. Wilkinson later left the BIA to pursue a ministry so that he could help victims of violent crime. *Id.*
15. *Id.*; *see also* MAZE OF INJUSTICE, *supra* note 13.
16. *Rape Cases Go Uninvestigated*, *supra* note 1. For more examples see also MAZE OF INJUSTICE, *supra* note 13; *Bill Moyers Journal*, *supra* note 13; *Justice Broken*, *supra* note 13.

Ironroad's story exemplifies all that is wrong with law enforcement in Indian Country.[17] Despite epidemic levels of sexual assaults against native women,[18] tribal governments are largely powerless to prosecute offenders.[19] The primary obstacle to enforcement is a confusing knot of jurisdictional rules that impede available law enforcement resources and that divest tribes of the authority to adequately prosecute those who victimize tribal citizens.[20] Under federal law, tribal governments lack jurisdiction over most major crimes, including rape, that occur on reservation land.[21] Tribes have no jurisdiction over any crimes committed by non-Indians even though more than 80 percent of sexual assaults on tribal lands are committed by non-Indians.[22] As a result, tribal law enforcement officials must refer victims to the Federal Bureau of Investigation (FBI) and

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17. "Indian country" is defined to include

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

18. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5)(A), 124 Stat. 2261, 2262 (2010) (finding that "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions"); *see also* Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 2–4 (2009); *see generally* MAZE OF INJUSTICE, *supra* note 13; *Rape Cases Go Uninvestigated*, *supra* note 1.

19. *See* § 202(a)(3), 124 Stat. at 2262; 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan); *see generally* MAZE OF INJUSTICE, *supra* note 13; Pacheco, *supra* note 18, at 23, 29; *Rape Cases Go Uninvestigated*, *supra* note 1.

20. § 202(a)(4), 124 Stat. at 2262; 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan); AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA—ONE YEAR UPDATE 9 (2008), *available at* http://www.amnestyusa.org/pdf/maze_1yr.pdf [hereinafter ONE YEAR UPDATE]; Troy A. Eid, *Beyond* Oliphant*: Strengthening Criminal Justice in Indian Country*, FED. LAW., Mar./Apr. 2007, at 40, 42, 44.

21. 18 U.S.C. § 1153 (2006); Eid, *supra* note 20, at 44.

22. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, FOCUS SHEET—THE ROLE OF SOVEREIGN TRIBAL AUTHORITY 1 (2007), *available at* http://www.amnestyusa.org/women/maze/SovereignTribalAuthority.pdf [hereinafter SOVEREIGN TRIBAL AUTHORITY]; *see also* Pacheco, *supra* note 18, at 2; Ralph Blumenthal, *For Indian Victims of Sexual Assault, a Tangled Legal Path*, N.Y. TIMES, Apr. 25, 2007, at A16.

the U.S. Attorneys' Office, where prosecution of sexual offenders who commit crimes in Indian Country is nearly nonexistent.[23]

Consequently, tribal lands have become safe havens for sexual predators, who can commit their offenses with little fear of prosecution.[24] As Fort Peck Tribal Chairman A.T. "Rusty" Stafne explained, "Our people are afraid because there are persons committing crimes against us at night and in broad daylight. . . . We have criminals that are simply unafraid of prosecution."[25] Indeed, "[t]o a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity."[26]

Congress has responded to the epidemic of reservation crime with the Tribal Law and Order Act[27] (TLOA). But, as this article explains, the TLOA is fundamentally flawed, and will likely do little to address the underlying impediment to effective tribal law enforcement because it leaves the prevailing jurisdictional confusion in place. Instead, I argue that tribal governments will be able to adequately safeguard their citizens only if Congress expands tribal jurisdiction to permit tribes to arrest and prosecute all those who victimize tribal citizens. Part I discusses the legal barriers that leave reservations and Indian women open to sexual predators who have little fear of prosecution. Part II discusses the TLOA's provisions to improve tribal law enforcement. Part III concludes that the TLOA does not go far enough to protect Indian women victimized by sexual assault. This article proposes instead that tribes need local control over law enforcement to effectively safeguard their citizens. For too long, tribes have been left powerless to defend their own people against predators who enter reservation lands and commit unspeakable violence against tribal citizens. At the heart of sovereignty is the responsibility of government to protect its citizens. It is time to permit tribes to rise to this responsibility.

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23. *See, e.g.*, *All Things Considered: Legal Hurdles Stall Rape Cases on Native Lands* (NPR radio broadcast July 26, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12260610 [hereinafter *Legal Hurdles*].

24. *Id.* (quoting Chickasaw Tribal Police Chief explaining that "[m]any of the criminals know Indian lands are almost a lawless community, where they can do whatever they want"); *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. John Barrasso). Similarly, "drug cartels deliberately base their operations in Indian Country because of the lack of law enforcement." 154 CONG. REC. H8455 (daily ed. Sept. 18, 2008) (statement of Rep. Herseth Sandlin).

25. ONE YEAR UPDATE, *supra* note 20, at 9.

26. SOVEREIGN TRIBAL AUTHORITY, *supra* note 22, at 2 (quoting Dr. David Lisak, Assoc. Professor of Psychol., Univ. of Mass.); *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. John Barrasso).

27. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

## I. LAW ENFORCEMENT IN A BIND: THE EPIDEMIC OF SEXUAL ASSAULT ON INDIAN RESERVATIONS

Tragically, what happened to Leslie Ironroad is not unusual in Indian Country, where the criminal justice system is severely broken and crime has created a public safety crisis.[28] Criminal investigations are delayed if they are pursued at all and serious felonies routinely escape prosecution all together.[29] As a consequence, Indian reservations have become prosecution-free zones where sexual predators can repeatedly victimize Indian women with impunity.[30]

### *A. An Epidemic of Crime in Indian Country*

According to some authorities, violent crime rates range from two to twenty times the national average depending on the reservation.[31] Indeed, while crime outside Indian reservations has generally declined in recent years, reservations have seen violent crime spiral upward over the same time period.[32] For sexual assaults, the number of reported cases is staggering.[33] By U.S. Department of Justice (Justice Department) esti-

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28. 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan); *see also Justice Broken*, *supra* note 13; Eid, *supra* note 20, at 42.

29. *Justice Broken*, *supra* note 13; *see also* MAZE OF INJUSTICE, *supra* note 13, at 61–62.

30. *Justice Broken*, *supra* note 13; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. John Barrasso) ("Criminal elements are well aware of the conditions of near lawlessness in some reservation areas."); Eid, *supra* note 20, at 40.

31. *See, e.g.*, 155 CONG. REC. S4333–44 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan ("The violent crime rate in Indian country is nearly twice the national average, and more than 20 times the national average on some reservations."); STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002, at 4, 5 (2004), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf (stating that the violent crime rate among Native Americans is two and a half times the national average).

32. FBI, 2006 CRIME IN THE UNITED STATES, TABLE 1 (2007), *available at* http://www.fbi.gov/ucr/cius2006/data/table_01.html. According to one reporter, between 2002 and 2006, homicides increased 14 percent on Indian reservations. Todd Richmond, *Tribes, Police Band Together to Fight Drugs, Gangs*, ASSOCIATED PRESS, June 5, 2009. In the same period, robberies increased 123 percent. *Id.*

33. *See, e.g.*, PERRY, *supra* note 31, at 4, 5 (finding that Native Americans endure violent crimes at an average rate of 101 victims for every 1,000 persons and are two times more likely to experience rape or sexual assault); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), *available at* http://www.ncjrs.gov/pdffiles/172837.pdf (finding that more than one-third of Native American women likely to be raped); CALLIE RENNISON, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993–98, at 9 (2001), *available at* http://

mates, one in three native women will be raped in her lifetime, nearly twice the national average.[34] Further, American Indian and Alaska Native women are two-and-a-half times more likely to be the victim of a violent or sexual assault in their lifetimes than nonnative women.[35]

Tribal officials point out that the lack of prosecutions often permits an escalation of criminal activity that results in increasingly violent behavior.[36] It also leaves Indian women open to victimization by sexual predators, the vast majority of whom are non-Indians who enter reserva-

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bjs.ojp.usdoj.gov/content/pub/pdf/vvr98.pdf (finding that 23.2 out of 100 Native American women are victims of "intimate partner violence").

34. TJADEN & THOENNES, *supra* note 33, at 22 (chart detailing percentages of persons victimized by rape in their lifetime by gender). In contrast, one in five women in the United States will be raped in her lifetime. *Id.* Rates of sexual assault on Alaska Native women are even more staggering. According to one study, Alaska Native women in Anchorage were ten times more likely to be sexually assaulted than nonnative women. ANDRÉ ROSAY, UNIVERSITY OF ALASKA, JUSTICE CENTER, DESCRIPTIVE ANALYSIS OF SEXUAL ASSAULTS IN ANCHORAGE, ALASKA: 2002/2003 UPDATE 7–8 (2006).

35. Press Release, Amnesty Int'l, U.S. House to Hear Testimony on Sexual Violence Against Native American and Alaska Native Women (Mar. 24, 2009), http://www.amnestyusa.org/document.php?id=ENGUSA20090324002&lang=E. Since 1991, Alaska Native women have comprised nearly 80 percent of victims of rape and murder in that state. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA: EXECUTIVE SUMMARY (2007), *available at* http://www.amnestyusa.org/women/maze/exec%20summary.pdf [hereinafter *Executive Summary*]. The crimes committed are horrific. The first Native Anchorage Police officer explained that in her decade on the police force, she had lost count of the number of Alaska Native women raped and murdered. *All Things Considered: Rapes, Abuse High for Indigenous U.S. Women* (NPR radio broadcast April 24, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=9803207 [hereinafter *Rapes High for Indigenous Women*]. In many cases, the victims were tortured and beaten to death in addition to being raped. *Id.* Moreover, in many cases, these murders were not reported even by those who saw the victims' bodies. *Id.* Even though Alaska Native women account for less than 10 percent of Anchorage's population, they account for more than half of all women sexually assaulted each year in Anchorage. ROSAY, *supra* note 34, at 8.

36. *Rapes High for Indigenous Women*, *supra* note 35. For instance, a tribal prosecutor sought the help of federal prosecutors to stop a serial rapist preying on women on the Fort Berthold Reservation. Michael Riley, *Principles, Politics Collide*, DENV. POST, Nov. 13, 2007, at A1 [hereinafter *Principles, Politics*]. The suspect had committed two rapes at Fort Berthold and was a suspect in a rape that had occurred a decade earlier on another reservation. *Id.* Without jurisdiction, tribal prosecutors could do nothing to investigate the pattern. *Id.* Federal prosecutors never responded. *Id.* Three years later, just after the case was closed by tribal prosecutors, the rapist struck again, abducting a woman who leapt from the vehicle to escape her attacker. *Id.* She spent the night outside in frigid temperatures before she was able to reach safety. *Id.*

tion lands to commit their crimes.[37] According to the Justice Department, 86 percent of sexual assaults against Indian women are perpetrated by non-Indian men.[38] This contrasts markedly with the U.S. population as a whole, where both victim and perpetrator are most often of the same racial or ethnic group.[39]

Of course, Justice Department statistics cannot account for the number of sexual assaults that go unreported. Research conducted by Amnesty International reveals that, similar to nonnative women, Indian women are assaulted at rates much higher than suggested by police reports.[40] Nevertheless, the fact that women do not report being assaulted should be regarded as another failure of law enforcement.[41] Discouraged by the lack of law enforcement protection, Indian women do not report rapes and other sexual assaults "because of the belief that nothing will be done."[42] They are told by relatives and friends that no one will prosecute the rape of an Indian woman.[43] This belief is reinforced by the fact that the majority of reported assaults are ignored, with little or no investigation or prosecution.[44]

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37. *See* Pacheco, *supra* note 18, at 3 ("Tribes were once able and willing to deal with perpetrators of violence against women, and . . . the tribes' ability to enforce their laws bred a culture where women were safe.").

38. PERRY, *supra* note 31, at 22.

39. *See, e.g.*, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES 30 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0602.pdf.

40. According to a recent Amnesty International study, Native American women are sexually assaulted at rates higher than indicated by federal statistics. EXECUTIVE SUMMARY, *supra* note 35, at 2. Amnesty International researched sexual violence in Indian Country in 2005 and 2006 in consultation with American Indians and Alaska Natives. *Id.* In conducting this research, Amnesty International focused on Oklahoma, the Standing Rock Sioux Reservation, and Alaska, interviewing victims of sexual assault and their families, tribal law enforcement officials, and support workers. *Id.* Amnesty International also interviewed federal and state law enforcement officials. *Id.*

41. *See* MAZE OF INJUSTICE, *supra* note 13 (noting that indigenous women are often deterred from reporting sexual assault).

42. SOVEREIGN TRIBAL AUTHORITY, *supra* note 22, at 1; *see also* Blumenthal, *supra* note 22.

43. *Legal Hurdles*, *supra* note 23. Indian woman recounted being raped by four white men when she was fourteen-years-old. *Id.* Following the advice of her mother and relatives—and believing that no one would take her word against five white men—she never reported the crime and the perpetrators were left free to commit more offenses. *Id.*

44. EXECUTIVE SUMMARY, *supra* note 35, at 1.

Often, women who do report being raped are turned away or not believed.[45] One woman reported being raped by three men who held her captive for three days.[46] Police dismissed her report, labeling the rape "consensual sex" and explaining that she would not be believed with three witnesses against her.[47] The victim stated, "I had cigarette burns on me, and they called it consensual."[48] Even when a report is taken seriously, long delays in investigations can leave reservation residents demoralized.[49] All too often, victims receive no information about what, if any, progress is being made on pursuing their attackers.[50] These delays, which allow perpetrators to prey on more victims, can increase the likelihood of reprisals against victims and witnesses.[51] Consequently, in those cases when prosecutions are finally pursued years later, victims often decline to press charges.[52] Furthermore, long delays by federal agents can thwart the ability of tribal prosecutors to pursue even weak misdemeanor charges as investigations drag past the relevant statute of limitations.[53]

High rates of crime and weak attempts at prosecution combine to create a lawlessness on reservations that undermines tribal communities and that leaves Indian women at risk. Since their crimes are either not reported or not prosecuted, sexual predators are free to offend again and again in a upward spiral of crime and violence. Consequently, many Indians believe that the justice system neither serves nor protects them.[54] Crime victims feel trapped in their homes, fearful of repeated attacks.[55] Other families, no longer feeling safe on the reservation, opt to leave.[56]

### *B. A Jurisdictional Knot*

The primary stumbling block to investigating and prosecuting a crime committed in Indian Country is a complex jurisdictional knot that is more likely to thwart justice than to serve it.[57] These rules are a conse-

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45. Blumenthal, *supra* note 22.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Justice Broken*, *supra* note 13.
50. MAZE OF INJUSTICE, *supra* note 13.
51. *Id.*
52. *Justice Broken*, *supra* note 13.
53. *Id.*
54. *Bill Moyers Journal*, *supra* note 13.
55. *Justice Broken*, *supra* note 13.
56. *Id.*
57. "Jurisdiction in 'Indian country,' which is defined in 18 U.S.C. § 1151, . . . is governed by a complex patchwork of federal, state, and tribal law." Duro v. Reina, 495 U.S. 676, 680 n.1 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as*

quence of treaties, federal statutes, regulations, executive orders, and caselaw that have combined to create confusing overlaps of authority in some instances and jurisdictional gaps in others.[58] Proving that more law does not necessarily make more justice, overly complex jurisdictional rules have largely stripped tribal governments of their ability to police their own communities. Instead, that authority is delegated to federal or state officials who are largely "unaccountable to the communities for whom they ostensibly work" or "simply unfamiliar with the legal, cultural, and geographic terrain."[59]

It didn't start out this way. In the earliest Supreme Court cases addressing jurisdiction over crimes in Indian Country, the Court sided with tribal jurisdiction. For instance, in 1832 the Court held that tribes had authority over their own land and that the laws of the state where a tribe was located did not apply on tribal lands, even to non-Indians.[60]

Fifty years later, the Court reinforced its commitment to tribal jurisdiction in *Ex parte Crow Dog*.[61] In that case the Court held that tribes had exclusive criminal jurisdiction over tribal members for offenses committed on tribal lands. The case involved the murder of Spotted Tail, a Brule Sioux Indian, by another Sioux, Crow Dog.[62] Following the murder, which occurred on tribal lands, the Tribe punished Crow Dog according to tribal law, requiring him to pay restitution and to support Spotted Tail's family.[63] Dissatisfied with the Tribe's punishment, the BIA pursued federal prosecution.[64] After a trial in the District Court of the Dakota Territory, Crow Dog was found guilty and sentenced to death.[65] Crow Dog filed a

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*stated in* United States v. Lara, 541 U.S. 193 (2004); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.01, at 730 (Nell Jessup Newton ed., 2005); EXECUTIVE SUMMARY, *supra* note 35, at 2–3; Johnson, *supra* 31; Shelley Bluejay Pierce, *Tribes Helped With Preventing Violent Crimes Against Women*, NATIVE AMERICAN TIMES, Apr. 3, 2009. Another problem is chronic underfunding and the need to build strong tribal economies to support an effective and comprehensive tribal law enforcement system, but that is a subject for another article.

58. *See* Davis & Washburn, *supra* note 34, at 4; Pacheco, *supra* note 18, at 3; Eid, *supra* note 20, at 42, 44.

59. Davis & Washburn, *supra* note 34, at 4.

60. Worcester v. Georgia, 31 U.S. 515, 520 (1832). Indeed, states were considered a deadly enemy of Indians. United States v. Kagama, 118 U.S. 375, 384 (1886).

61. 109 U.S. 556 (1883).

62. *Crow Dog*, 109 U.S. at 557, 572; Pacheco, *supra* note 18, at 25 (providing background to relationship between Crow Dog and Spotted Tail).

63. *Crow Dog*, 109 U.S. at 557, 572; Pacheco, *supra* note 18, at 25 (providing background on punishment imposed by Tribe).

64. *Crow Dog*, 109 U.S. at 557, 572; Pacheco, *supra* note 18, at 25.

65. *Crow Dog*, 109 U.S. at 572; Pacheco, *supra* note 18, at 25 (explaining sentencing by territorial court).

petition for habeas corpus, challenging his conviction on the ground that territorial courts lacked jurisdiction over a crime committed in Indian territory by one Indian against another.[66] According to Crow Dog, neither federal nor territorial law applied to him.[67] Rather, he was subject only to the jurisdiction of his Tribe.[68] For its part, the United States contended that the Sioux Treaty of 1868 and other federal statutes conferred criminal jurisdiction over Sioux lands to the United States.[69]

In granting Crow Dog's petition, the Supreme Court held that the federal government lacked jurisdiction to prosecute Crow Dog.[70] Agreeing with Crow Dog, the Court held that jurisdiction resided with the Sioux and that Crow Dog was subject only to tribal law.[71] In reaching this conclusion, the Court relied in part on a provision in the 1868 Treaty that provided that Congress would "secure to [the Tribe] an orderly government."[72] For the Court, this pledge "necessarily implied" that Congress was to ensure the tribes' right "of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs."[73] To ensure order and peace, the Tribe needed proper jurisdiction to punish the murder of one tribal member by another.[74]

In holding that the Tribe had exclusive jurisdiction, the Court found its opinion reinforced by the distinct "nature and circumstances of th[e] case."[75] Of particular importance to the Court was the limited jurisdiction of the territorial court and that the case concerned "life and death."[76] Given the weighty matter, the Court was unsettled by the federal government's attempt to extend its laws "by argument and inference only."[77] In particular, the Court expressed concern with subjecting Indians to laws which they had no role in drafting and that grew out of a different culture and context than their own.[78] According to the Court, permitting federal jurisdiction would permit the extension of federal criminal law

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66. *Crow Dog*, 109 U.S. at 557, 572; Pacheco, *supra* note 18, at 25 (discussing Crow Dog's petition).
67. *Crow Dog*, 109 U.S. at 557.
68. *Id.*
69. *Id.* at 562–63.
70. *Id.* at 572.
71. *Id.*
72. *Id.* at 568.
73. *Id.*
74. *Id.* at 557, 572.
75. *Id*. at 571.
76. *Id.*
77. *Id.*
78. *Id.*

> over aliens and strangers; over the members of a community separated by race, by tradition,. . .from the authority and power which seeks to impose upon them the restraints of an external and unknown code, . . . according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives . . . .[79]

Especially significant to the Court was a history of government policy that had sought to regulate crimes by Indians against non-Indians or by non-Indians against Indians, but which had left crimes by Indians against each other to "each tribe [to deal with] for itself, according to its local customs."[80] Viewing tribes as "semi-independent," federal law "ha[d] always recognized [tribes] as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions."[81] The Court was reluctant to reverse this "uniform" policy without an express act of Congress.[82] Because Congress had not expressly done so, the Tribe retained exclusive jurisdiction to punish an offender.[83] Nevertheless, the Court recognized that Congress possessed the authority to confer jurisdiction on federal courts.[84]

Congress responded to *Crow Dog* by passing the Major Crimes Act (MCA) in 1885.[85] The MCA granted federal jurisdiction over certain major crimes committed by Indians in Indian Country.[86] The enumerated crimes include major felonies such as murder, kidnapping, rape, and sexual assault.[87] Just three years after *Crow Dog*, the Supreme Court upheld

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79. *Id.*
80. *Id.* at 572.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 561–62.
85. *See* 18 U.S.C. § 1153 (2006); *see also* Keeble v. United States, 412 U.S. 205, 209–12 (1973) (noting that Major Crimes Act was Congress's response to *Crow Dog*); COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 759 (citing WILLIAM A. BROPHY & SOPHIE D. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 48–49 (1966)); Pacheco, *supra* note 18, at 25–26.
86. 18 U.S.C. § 1153; *see* Pacheco, *supra* note 18, at 26.
87. Specifically, the MCA grants federal jurisdiction over the following offenses:
> [M]urder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous

the authority of Congress to regulate crime occurring within tribal lands under the MCA.[88]

Further, although the MCA applies only to Indian defendants, under the Indian Country Crimes Act (ICCA) of 1854,[89] the federal government has jurisdiction to prosecute all violations of "the general laws of the United States" in Indian Country committed either by or against a non-Indian.[90] ICCA was designed to address "interracial crime," that is, where the perpetrator is Indian and the victim is not, or where the victim is Indian, but the perpetrator is not.[91] When both perpetrator and victim are non-Indian, state jurisdiction applies.[92] Nor does ICCA apply to of-

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> weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country . . . .

18 U.S.C. § 1153(a).

88. United States v. Kagama, 118 U.S. 375 (1886); *accord* Roberts, *supra* note 31, at 539. In *United States v. Kagama*, the Court held that Congress validly exercised its "plenary power" over Indian tribes in passing the MCA. 118 U.S. at 384–85. According to the Court, because Congress had declared that it would no longer treaty with Indian tribes, the tribes were no longer to be viewed as independent sovereign nations. *Id.* at 382. Thus, like its authority to regulate the territories, Congress had authority to regulate Indian Country by virtue of federal "ownership of the country in which the territories [we]re, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." *Id.* at 380. Furthermore, Indian tribes were "within the geographical limits of the United States." *Id.* at 379. And, those within those limits, "[we]re under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two." *Id.* Rather than independent sovereigns, "Indian tribes *are* the wards of the nation . . . dependent on the United States . . . for their political rights" and for protection from the states. *Id.* at 383–84. Along with this federal "duty of protection" came a power that "has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen." *Id.* at 384. Under this reasoning, congressional authority to regulate the tribes' internal affairs existed "because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* at 384–85; *see also* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 827–28 (1996).

89. Also known as the General Crimes Act. COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 731.

90. 18 U.S.C. § 1152 (2006).

91. COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 734.

92. United States v. McBratney, 104 U.S. 621, 624 (1881); *accord* COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 738, § 9.03, at 754–56; Roberts, *supra* note 31, at 539. In *McBratney*, the Supreme Court held that although ICCA vested jurisdiction with the United States over crimes committed by non-Indians against non-Indians, upon statehood that jurisdiction was assumed by the new state. 104 U.S. at 624 (find-

fenses committed by one Indian against another Indian or to those crimes committed by an Indian against a non-Indian where the tribe has already imposed punishment.[93]

For their part, tribes have jurisdiction over any crime committed by an Indian against another Indian person or against Indian-held property within Indian Country.[94] Whether that jurisdiction is exclusive or concurrent depends on the particular offense committed.[95] A tribe has concurrent jurisdiction over offenses that fall under ICCA.[96] Further, a tribe has exclusive jurisdiction over those offenses not listed in the MCA when committed by an Indian in Indian Country, except in those states where Public Law 280 applies.[97]

It is less settled whether tribes have concurrent jurisdiction over Indian offenders for those offenses that are enumerated in the MCA.[98] The

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ing State of Colorado had jurisdiction over prosecution of murder of non-Indian by non-Indian on Ute reservation); *accord* Roberts, *supra* note 31, at 539. For a brief discussion of the Court's questionable statutory interpretation in *McBratney*, see COHEN'S HANDBOOK, *supra* note 57, § 6.01, at 506 n.59. According to the Court, state jurisdiction was necessary as the tribe would not be interested in prosecuting a crime that did not involve its own members. *See id.* § 9.03, at 755.

93. 18 U.S.C. § 1152; COHEN'S HANDBOOK, *supra* note 57, at § 9.02, 738, 741.

94. *See* United States v. Wheeler, 435 U.S. 313, 328–29 (1978), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized by* United States v. Lara, 541 U.S. 193 (2004) (holding that tribes' retained sovereignty permits them to prosecute Indian offenders); Duro v. Reina, 495 U.S. 676, 694 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004)); *see also* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 756.

95. *See* COHEN'S HANDBOOK, *supra* note 57, § 9.03, at 756.

96. *See id.* at 758.

97. Generally, states do not have jurisdiction over crimes committed by Indians on tribal land. *See* Negonsott v. Samuels, 507 U.S. 99, 103 (1993). Under the MCA and ICCA, federal jurisdiction is exclusive of state jurisdiction. *See* United States v. John, 437 U.S. 634, 651 (1978); *see also* COHEN'S HANDBOOK, *supra* note 57, § 9.03, at 756–57. Thus, when either of these statutes apply, the state has no jurisdiction over the offense. COHEN'S HANDBOOK, *supra* note 57, § 9.03, at 754. An exception to the general rule are the five states governed by Public Law 280, which grants them jurisdiction to prosecute crimes on Indian reservations regardless whether the perpetrator or victim are Indian. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 25 U.S.C.); *accord* Pacheco, *supra* note 18, at 31–32. Under Public Law 280, tribes and states share concurrent jurisdiction over crimes committed in Indian Country by Indians. COHEN'S HANDBOOK, *supra* note 57, § 9.03, at 754; *accord* Pacheco, *supra* note 18, at 31. Another exception would be those tribes subjected to state law by a specific congressional action. *See, e.g.*, Kansas Act, 18 U.S.C. § 3243 (2006) (granting Kansas jurisdiction over offenses on Indian reservations).

98. *See* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 758 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978), *superseded in part by statute*,

Supreme Court has indicated in dicta that the MCA makes federal jurisdiction exclusive of tribal and state jurisdiction.[99] More recently, however, the Ninth Circuit in *Wetsit v. Stafne* directly addressed the question and reached the opposite conclusion.[100] In that case, Georgia Leigh Wetsit, a member of the Fort Peck Tribe, sought habeas relief after being convicted in tribal court for manslaughter.[101] Because she had been tried and acquitted in federal court, Wetsit challenged her tribal conviction on the ground that the MCA divested the Tribe of jurisdiction over the killing of her common-law husband, who was also a member of the Tribe.[102]

Relying on *United States v. Wheeler*,[103] the circuit court held that the Tribe retained concurrent jurisdiction under the MCA.[104] Although *Wheeler* concerned an issue of double jeopardy not present in *Wetsit*, the court was guided by *Wheeler*'s conclusion "that the tribes had not given up their power to prosecute their members for tribal offenses 'by virtue of their dependent status.'"[105] Rather, in acting on that power, the Tribe was "acting 'as an independent sovereign.'"[106] The court was further persuaded by the tribes' persistent practice of prosecuting theft, which is included in the MCA as "larceny."[107] According to the court, tribal prosecution was necessary because federal prosecution of larceny was "virtually nonexistent."[108] Following this example, the court found that the MCA "permits conviction of the lesser offenses included within the crime specified, and to hold that the tribal jurisdiction is thereby pre-

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25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004)); *see also* Pacheco, *supra* note 18, at 26–28.

99. *See* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 759; *see also Oliphant*, 435 U.S. 191 (citing Felicia v. United States, 495 F.2d 353, 354 (8th Cir. 1974) and Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967)).

100. 44 F.3d 823, 825–26 (9th Cir. 1995); *see also* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 759.

101. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 232–58 (4th ed. 2004). For a discussion of Public Law 280, see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Rule of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 306–07 (1998).

102. *Wetsit*, 44 F.3d at 824.

103. 435 U.S. 313 (1978), *superseded by statute*, 25 U.S. C. § 1301(2), *as recognized by* United States v. Lara, 541 U.S. 193 (2004).

104. *Wetsit*, 44 F.3d at 825; *see also* Roberts, *supra* note 31, at 541.

105. *Wetsit*, 44 F.3d at 825 (quoting *Wheeler*, 435 U.S. at 326).

106. *Id.* (quoting *Wheeler*, 435 U.S. at 329).

107. *Id.* (citing WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 135 (2d ed. 1988)).

108. *Id.* (citing & quoting CANBY, *supra* note 107, at 35).

empted would preempt a large part of a tribe's criminal jurisdiction."[109] Noting that without tribal jurisdiction "many crimes on a reservation would still go unpunished," the court concluded that retention of "jurisdiction by the tribes can only increase their responsibility for efficient and fair justice."[110]

### *C. Hobbling Tribal Law Enforcement*

Even assuming that tribal courts retain concurrent jurisdiction over Indian defendants, the reality is that few major crimes have been prosecuted in tribal courts.[111] One reason for this is that while a tribe might prosecute a felony such as rape or murder, it can only subject those convicted to misdemeanor penalties.[112] The Indian Civil Rights Act (ICRA) currently limits the criminal sentences that tribal courts can impose for any one offense to one year and a fine of $5,000.[113] Given those restrictions, tribes largely opt to forego prosecution.[114] Moreover, because tribal

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109. *Id.* at 826 (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 339–41 (Rennard Strickland, ed. 1982)).

110. *Id.* at 825–26 (citing NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS IN THE FUTURE 33–35 (1978)).

111. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA: FOCUS SHEET—JURISDICTION 2 (2007), *available at* http://www.amnestyusa.org/women/maze/Jurisdiction-Focussheet.pdf [hereinafter *Jurisdiction*].

112. 25 U.S.C. §§ 1301–03 (2006) (limiting tribal penalties to less than one year incarceration and maximum $5,000 fine).

113. 25 U.S.C. § 1302(7). While ICRA limits the tribe's ability to incarcerate or fine those convicted, it does not bar the tribe from imposing traditional tribal sanctions. COHEN'S HANDBOOK, *supra* note 57, § 9.09, at 769. Prior to European contact, tribes did not imprison wrongdoers. *Id.* Rather, many tribes punished those who violated tribal rules with "[o]stracism, group disapproval, ridicule, religious controls . . . denial of privileges," restitution and exile. *Id.* These punishments are not consistently used today, with most tribes relying on fines and imprisonment. *Id.* The tribe could also impose other sanctions such as community service or probation. *Id.* Moreover, it was the distrust of tribal punishments that spurred Congress to move to limit tribal jurisdiction. *Id.*; *see also* Keeble v. United States, 412 U.S. 205, 209–12 (1973) (noting that Congress passed Major Crimes Act in response to *Crow Dog*); COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 759 (citing WILLIAM A. BROPHY & SOPHIE D. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 48–49 (1966)).

114. CANBY, *supra* note 101, at 172 ("Even before passage of the [Indian] Civil Rights Act, most tribes had left major crimes other than larceny entirely to the federal government; with the Act's sentencing limit they have little incentive to change that pattern. Here as elsewhere tribes may choose to exercise less than their maximum jurisdiction."). Ironically, the limitations on tribal sentencing have been called on to justify further incursions into tribal sovereignty. In 1968, Congress amended the MCA to provide federal jurisdiction over assaults resulting in serious bodily injury. 18 U.S.C. § 1153 (2006) The inclusion of this offense was deemed necessary because

jails are often underfunded, sentences are usually much shorter simply because tribal jails lack bed space to hold offenders.[115]

Tribes have no jurisdiction to prosecute or punish non-Indian offenders, even for crimes occurring against Indians on tribal lands.[116] In *Oliphant v. Suquamish Indian Tribe*, the Suquamish Indian Provisional Court attempted to prosecute two non-Indian residents of the Port Madison Indian Reservation for misdemeanor offenses that occurred on Reservation.[117] The trial was halted when the two defendants, Mark Oliphant and Daniel Belgarde, sought habeas relief.[118] In challenging their prosecutions, the defendants argued that the tribal court lacked jurisdiction to prosecute non-Indians.[119] For its part, the Tribe contended that its

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> [w]ithout this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense.

*Keeble*, 412 U.S. at 211 n.10 (quoting S. Rep. No. 90-721, at 32 (1967)). ICRA's limit on tribal penalties has been criticized for implying that tribes are ill-equipped to handle anything but misdemeanor offenses. JURISDICTION, *supra* note 111, 3.

115. *Principles, Politics*, *supra* note 36; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan) ("The lack of jail bed space has forced tribal courts to release a number of offenders.").

116. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004); *see also* Roberts, *supra* note 31, at 540; Eid, *supra* note 20, at 44. Tribes do retain the authority to exclude anyone, including non-Indians, from their reservations. *See* Duro v. Reina, 495 U.S. 676, 696–97 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004); *see also* Worcester v. Georgia, 31 U.S. 515, 561 (1832); COHEN'S HANDBOOK, *supra* note 57, § 9.09, at 769. This is true even if the tribe lacks criminal jurisdiction over the individual. *Duro*, 495 U.S. at 696–97. This principle does not apply in cases where the person has a federal patent to fee land within tribal lands or where law enforcement officers enter tribal lands to enforce violations that occurred off reservation, COHEN'S HANDBOOK, *supra* note 57, § 4.01, at 220 (citing Nevada v. Hicks, 533 U.S. 353, 363–64 (2001)), or where reservation roads are constructed with federal funds, as those roads must be kept open to the public. *Id.* at 220 n.144. This suggests that a tribe could then try a non-Indian for an offense as long as the only punishment is exile. *Id.* § 9.09, at 769.

117. *Oliphant*, 435 U.S. at 193–94; Roberts, *supra* note 31, at 540. One defendant had been charged with assaulting a tribal officer and resisting arrest. *Oliphant*, 435 U.S. at 194. The other defendant was charged with reckless endangerment and injury to tribal property after he engaged police in a high-speed chase which ended when his vehicle crashed into a tribal police vehicle. *Id.*

118. *Oliphant*, 435 U.S. at 194.

119. *Id.*

jurisdiction over non-Indians stemmed from its "retained inherent powers of government over the Port Madison Indian Reservation."[120]

The district court rejected Oliphant's petition.[121] The Ninth Circuit affirmed, relying on the Supreme Court's recognition of Indian tribes as "quasi-sovereign entities," and explained that tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[122] Thus, tribal jurisdiction over persons committing crimes on the reservation were the "'sine qua non' of such powers."[123]

In reversing, however, the Supreme Court invoked an historical "unspoken assumption" held by all branches of the federal government that tribes had no jurisdiction over non-Indians.[124] This assumption formed the basis for the Court's conclusion that tribal jurisdiction over non-Indians would be "inconsistent with their status" as dependant nations.[125] In reaching this conclusion, the Court relied on the Treaty of Point Elliott, in which the Suquamish "acknowledge[d] their dependence on the government of the United States."[126] To the Court, "[b]y acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation."[127] Reading the Treaty with ICCA's extension of federal enclave law into Indian Country, the Court held that tribes could not prosecute non-Indian offenders, but must instead deliver them to federal authorities for prosecution.[128]

While the *Oliphant* Court acknowledged that the treaty provisions would not be sufficient by themselves to divest tribes of jurisdiction over non-Indians, it nevertheless went on to note that tribal jurisdiction could

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120. *Id.* at 196 (internal quotations omitted).

121. *Id.* at 194–95.

122. *Id.* at 196 (citing Morton v. Mancari 417 U.S. 535, 554 (1974)).

123. *Id.*

124. *Id.* at 196–205. The Court's assumption is belied by the fact that by 1978, approximately one-third of Indian tribes were exercising jurisdiction over nonmembers and non-Indians. Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1055 (2005); *see also* Roberts, *supra* note 31, at 541 ("[A]t the time [*Oliphant*] was decided, 33 of the 127 recognized tribes nationwide who exercised criminal jurisdiction extended that jurisdiction to cover non-Indians.").

125. *Oliphant*, 435 U.S. at 208 (internal quotations omitted).

126. *Id.* at 207 (internal citations omitted).

127. *Id.*

128. *Id.* at 208.

not lie absent an express grant of congressional authority.[129] Although tribes retained quasi-sovereign status, those retained powers were not sufficient to permit jurisdiction without express delegation from Congress.[130] Rather, "tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*.'"[131] That status, as independent nations, is "necessarily diminished" by virtue of being "a part of the territory of the United States" and of holding and occupying reservations with the assent and under the authority of the United States.[132] According to the Court, "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[133] As a consequence of their incorporation into the United States, tribes suffered "inherent limitations" on their sovereignty.[134] The "exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States."[135] Recognizing that crime by non-Indians on reservations was widespread, the Court nevertheless held that this limitation meant that tribal courts had no inherent jurisdiction to prosecute non-Indians.[136]

Also important to the Court was the desire of Congress to protect U.S. citizens from "unwarranted intrusions on their personal liberty."[137] Because tribes had submitted to the "overriding sovereignty of the United States," they had also ceded the authority to try non-Indians "except in a manner acceptable to Congress."[138] Invoking *Crow Dog*'s concern of subjecting one community's laws to those who are strangers to those laws, the Court expressed concern that non-Indians would be subjected to the law and procedure of tribal governments with which the non-Indians were unfamiliar.[139] The Court also feared that the full com-

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 209 (internal quotations omitted).
133. *Id.*
134. *Id.*
135. *Id.* at 211.
136. *Id.* at 212. In so doing, the Court also rejected the expression of jurisdiction by 33 of the 127 tribal court systems that also relied on retained sovereignty as the basis to exert jurisdiction over all persons who committed offenses on tribal lands. *See id*. at 196.
137. *Id.* at 210.
138. *Id.*
139. *Id.* at 210–11.

plement of "basic criminal rights that would attach in non-Indian related cases" would not be available in a tribal court.[140] Thus, denying tribes the authority to try and punish non-Indians would ensure against such intrusions.[141] That tribes had begun to develop courts that more closely resembled the Anglo model did not alter the Court's fundamental conclusion that tribal courts would not adjudicate cases in an acceptable manner.[142]

After *Oliphant*, the Court found that tribes also lacked jurisdiction over nonmember Indians—that is, over those Indians who were not also members of the particular tribe asserting jurisdiction.[143] Following its reasoning in *Oliphant*, the Court held in *Duro v. Reina* that tribal jurisdiction over a nonmember constituted an "external" power that was likewise "inconsistent with the Tribe's dependant status."[144] Rather, the tribe could exert such authority only through an express congressional grant and subject to constitutional safeguards.[145] That authorization came, however, when Congress amended ICRA to permit tribal jurisdiction over *all* Indians as part of "the inherent power[s] of an Indian tribe."[146] Under this "*Duro*-fix" nonmember Indians could be prosecuted by any tribe for offenses committed on tribal lands.[147] However, tribes still lacked jurisdiction to prosecute non-Indians, even those residing on reservation lands.

Despite its stated concern with imposing one community's laws on those who are strangers to those laws, the Court nonetheless upheld the *Duro*-fix as a proper exercise of congressional authority.[148] In *United States v. Lara*, the petitioner contended that his federal prosecution vio-

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140. *Id.* at 211.

141. *See id*. at 210. For a discussion of whether an individual is "Indian" for the purposes of criminal prosecution, see Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177 (2006).

142. *See Oliphant*, 435 U.S. at 210.

143. Duro v. Reina, 495 U.S. 676, 696–97 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004); *see also* Benjamin J. Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after* Duro v. Reina, 41 CONN. L. REV. 265, 265 (2008); Roberts, *supra* note 31, at 549.

144. *Duro*, 495 U.S. at 686.

145. *Id.* at 684–86.

146. 25 U.S.C. § 1301(2) (2006); *see also* Cordiano, *supra* note 143, at 266; Roberts, *supra* note 31, at 549.

147. § 1301(2)–(4); *see also* Cordiano, *supra* note 143, at 266; Roberts, *supra* note 31, at 544.

148. United States v. Lara, 541 U.S. 193, 200 (2004); *see also* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. Rev. 553, 597–600 (2009).

lated the double jeopardy clause of the U.S. Constitution[149] because he had already been subjected to tribal prosecution.[150] In finding that the subsequent federal prosecutions after a tribal prosecution did not run afoul of the double jeopardy clause, the Court concluded that the prosecutions were undertaken by separate sovereigns.[151] In so holding, the Court rejected the argument that the tribe's prosecution had been an exercise of delegated federal authority.[152] Rather, the Court recognized that a tribe's authority to prosecute came from the tribe's inherent tribal au-

149. U.S. CONST. amend. V.

150. *Lara*, 541 U.S. at 197; *accord* Roberts, *supra* note 31, at 530; Eric Wolpin, *Answering Lara's Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?*, 8 U. PA. J. CONST. L. 1071, 1077 (2006). Lara also challenged his tribal conviction on the ground that subjecting him to tribal prosecution violated the due process and equal protection clauses of the Constitution. *Lara*, 541 U.S. at 207–09. Specifically, Lara argued that he was denied full protection of the Bill of Rights in a tribal court proceeding in violation of due process. *Id.* He further contended that permitting tribal jurisdiction over him on the basis of his status as an Indian regardless of his tribal affiliation violated equal protection because it permitted nonmember Indians to be treated differently than nonmember non-Indians. *Id.* at 209. The Court, however, refused to consider either claim as Lara had failed to raise them in the tribal court. *Id.* Since neither issue had any bearing on the double-jeopardy issue that was before the Court, the Court declined to consider these two issues. *Id.*

Nor has the Court considered the issue since. Indeed, the Court has declined to review a case in which the Ninth Circuit found no equal protection violation. *See* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005). In that case, the Ninth Circuit, holding that a nonmember Indian was subject to tribal jurisdiction, reasoned that by criminal jurisdiction in the tribes over "all Indians," ICRA applied to all persons of Indian ancestry who were also Indians by political affiliation. *Id.* at 930. Thus, because jurisdiction depended on a political rather than a racial classification, it did not violate Means' right to equal protection. *Id.* at 932.

151. *Lara*, 541 U.S. at 210; *accord* Roberts, *supra* note 31, at 531–32; Wolpin, *supra* note 148, at 1077. The Court had reached a similar conclusion in *United States v. Wheeler*, finding that tribal authority to prosecute comes from the tribes' retained sovereignty and not as a delegation of federal authority. United States v. Wheeler, 435 U.S. 313 (1978), *superseded by statute*, 25 U.S. C. § 1301(2), *as recognized by* United States v. Lara, 541 U.S. 193 (2004). Thus, double jeopardy did not prohibit the prosecution of a member Indian in federal court after tribal court prosecution for the same offense. *Id.* at 330–31.

152. *Lara*, 541 U.S. at 210.

thority.[153] Accordingly, under the dual sovereignty doctrine,[154] a subsequent federal prosecution did not violate double jeopardy.[155]

In summary, under current jurisdictional rules, appropriate jurisdiction depends on (1) whether the victim is an Indian; (2) whether the alleged perpetrator is an Indian;[156] and (3) whether the offense took place on tribal lands.[157] Regardless whether the victim is an Indian, federal jurisdiction applies under the MCA when the perpetrator is an Indian accused of committing one of the MCA's enumerated crimes in Indian Country.[158] When an offense is not listed in the MCA, federal jurisdiction may still lie under ICCA when either—but not both—the victim or the accused is an Indian and the offense is a federal crime committed in In-

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153. *Id*.

154. The dual sovereignty doctrine provides that the prosecution of a defendant for "a single act [that] violates the 'peace and dignity' of two sovereigns by breaking the laws of each," does not violate Double Jeopardy because the defendant is deemed to have "committed two distinct 'offences.'" Heath v. Alabama, 474 U.S. 82, 88 (1985) (citing United States v. Lanza, 260 U.S. 377, 382 (1922)). The Supreme Court has explained that

> "An offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. . . . "

*Id.* (quoting Moore v. Illinois, 55 U.S. (14 How.) 13, 19–20 (1852)).

155. *Lara*, 541 U.S. at 210. Double-jeopardy is also implicated when the successive prosecution is by a tribal court after a federal prosecution. COHEN'S HANDBOOK, *supra* note 57, § 9.05, at 762. In such a case, the tribal court would not be bound by the Bill of Rights, but by ICRA's double-jeopardy provision as well as by any tribal laws with respect to double jeopardy. *Id.* In any event, the same reasoning underpinning the dual sovereignty doctrine would likely apply absent a tribal decision to bar dual prosecutions by separate sovereigns. *See id.*

156. Of course, one problem with this jurisdictional division is defining precisely who is an "Indian." Cohen's Handbook, *supra* note 61, § 9.02, at 739–41 (federal courts have created a two-part test to determine who is an "Indian" for criminal jurisdiction purposes). While it would apply to an enrolled member, what is less clear is when the perpetrator is not enrolled, but still considered an Indian by the tribe. *Id.* That question, however, is beyond the scope of this article.

157. Generally, states do not have jurisdiction over Indians on tribal land. An exception to this rule are the five states governed by Public Law 280, which grants them jurisdiction to prosecute crimes on Indian reservations regardless whether the perpetrator or victim are Indian. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered statutes of 18 U.S.C., 28 U.S.C., and 25 U.S.C.). Under Public Law 280, tribes and states share concurrent jurisdiction over crimes committed in Indian Country by Indians. *Id.* Another exception would be those tribes subjected to state law by express congressional action. *See supra* note 97.

158. 18 U.S.C. § 1153 (2006); COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 742–43. "Indian" is defined at 25 U.S.C. § 1301 (citing to 18 U.S.C. § 1153).

dian Country.[159] However, ICCA does not apply if the tribe has already imposed punishment against an Indian offender.[160] If neither the victim nor the accused is Indian and the crime is not a federal offense, state jurisdiction applies.[161] Ultimately, this means that tribal jurisdiction applies only when the perpetrator is an Indian who committed an offense not listed in the MCA against another Indian in Indian Country.[162] Finally, tribal jurisdiction may or may not be concurrent depending on the crime charged.[163] Given this complexity, it is unsurprising that law enforcement in Indian Country is "broken."[164]

## II. PULLING THREADS: THE TRIBAL LAW AND ORDER ACT OF 2010

Describing law enforcement in Indian Country as "a proven failure,"[165] Senator Byron Dorgan[166] introduced the Tribal Law and Order

159. COHEN'S HANDBOOK, *supra* note 57, § 6.01, at 509. Some state and federal courts have applied *United States v. McBratney*, 104 U.S. 621 (1882), to find that state jurisdiction lies over "victimless" crimes committed in Indian Country by non-Indians. COHEN'S HANDBOOK, *supra* note 57, § 9.03, at 755. However, even if a crime lacks an identifiable victim, federal jurisdiction is proper if the conduct impacts Indians or their interests. *Id.* § 9.03, at 756 (citing, e.g., *Memorandum from Office of Legal Counsel*, U.S. Dept. of Justice, *Jurisdiction Over "Victimless" Crimes Committed by Non-Indians*, 6 INDIAN L. REP. K-15 (1979)).

160. 18 U.S.C. § 1152 (2006); COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 738, 741.

161. *See* COHEN'S HANDBOOK, *supra* note 57, § 6.01, at 509–10.

162. *See* United States v. Wheeler, 435 U.S. 313, 328–29, *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized by* United States v. Lara, 541 U.S. 193 (2004) (holding that tribes' retained sovereignty permits them to prosecute Indian offenders); Duro v. Reina, 495 U.S. 676, 694 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004); *see also* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 756.

163. *See* COHEN'S HANDBOOK, *supra* note 57, § 9.04, at 756.

164. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan) (referring to the justice system on tribal lands as "broken"); *see* Eid, *supra* note 20, at 42, 44–46.

165. Mary Clare Jalonick, *Justice Department Refuses to Release Indian Crime Data*, BISMARCK TRIB., Sept. 19, 2008.

166. Senator Dorgan is the Chair of the Senate Committee on Indian Affairs. Press Release, U.S. S. Comm. on Indian Affairs, Legislation Would Strengthen Law & Order in Indian Country (Apr. 3, 2009), *available at* http://indian.senate.gov/news/pressreleases/2009-04-03.cfm [hereinafter Dorgan Press Release April 2009]. Dorgan was joined by Senators John Barrasso (R-WY), Max Baucus (D-MT), Jeff Bingaman (D-NM), John Kyl (R-AZ), Ron Wyden (D-OR), Tim Johnson (D-SD), Maria Cantwell (D-WA), Lisa Murkowski (R-AK), John Thune (R-SD), John Tester (D-MT), Mark Begich (D-AK), and Tom Udall (D-NM). *Id.* At the same time, Represen-

Act (TLOA) in 2009 "to strengthen law enforcement and justice in Indian communities."[167] Passed by Congress and signed into law in 2010, the TLOA aims to address the failures that have permitted crime to flourish on Indian reservations.[168] Specifically, the TLOA seeks to "boost law enforcement efforts by providing tools to tribal justice officials to fight

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tative Stephanie Herseth Sandlin introduced companion legislation in the House. H.R. 1924, 111th Cong. (2009).

167. Dorgan Press Release April 2009, *supra* note 166. Throughout 2009, the Justice Department held a series "Tribal Nations Listening Conferences" in 2009. Press Release, U.S. Dep't of Justice, Associate Attorney General Tom Perrelli Announces New Initiative on Tribal Justice in Indian Country (June 15, 2009), *available at* http://www.justice.gov/opa/pr/2009/June/09-aag-589.html. During these conferences, Justice Department officials "confer[red] with tribal leaders on how to address the chronic problems of public safety in Indian Country and other important issues affecting tribal communities." *Id.*; *see also* U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE PLAN TO DEVELOP A TRIBAL CONSULTATION AND COORDINATION POLICY IMPLEMENTING EXECUTIVE ORDER 13175 (2010), *available at* http://www.justice.gov/opa/documents/exec13175-consultation-policy.pdf [hereinafter Dep't of Justice Jan. 27, 2010, Report]. At the conclusion of the series of meetings, the Attorney General instructed those U.S. Attorneys' Offices serving Indian Country to meet annually with tribal leaders, to develop operational plans for dealing with reservation crime, and to make crimes against women in Indian Country a priority. Press Release, U.S. Dep't of Justice, Attorney General Announces Significant Reforms to Improve Public Safety in Indian Country (Jan. 11, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-ag-019.html [hereinafter Dep't of Justice Jan. 11, 2010, Press Release]; Dep't of Justice Jan. 27, 2010, Report, *supra*. Further, the Justice Department announced it would increase the budget for prosecution of crimes in Indian Country by six million dollars. Dep't of Justice Jan. 11, 2010, Press Release. Although current staffing levels leave federal prosecutors overwhelmed and unable to prosecute more than two-thirds of reservation crime, the Justice Department plans to hire thirty-five additional prosecutors and twelve FBI victim specialists to serve the forty-four U.S. Attorney districts that serve Indian Country. Dep't of Justice Jan. 11, 2010, Press Release, *supra*. Further, the Justice Department will reorganize the Office of Tribal Justice to serve as the liaison between the Department and tribal governments. Dep't of Justice Jan. 27, 2010, Report, *supra*.

168. When Congress passed the TLOA it did so as an amendment to H.R. 725, The Indian Arts and Crafts Amendment Act of 2010. The bill signed into law is substantially similar to S.B. 797 as introduced by Senator Dorgan in 2009, but there are some significant differences. *Compare* S. 797, 111th Cong. § 501 (as introduced in the Senate, Apr. 2, 2009), *with* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 251, 124 Stat. 2258, 2297–2299. Furthermore, the initial bill included more extensive congressional findings, some of which are omitted from the final act's list of findings. *Compare* S. 797, 111th Cong., § 2 (as introduced in the Senate, Apr. 2, 2009), *with* § 202, 124 Stat. at 2262–63. Because these findings are nonetheless part of the act's legislative history, they are discussed in this article.

crime in their own communities, improving coordination between law enforcement agencies, and increasing accountability standards."[169]

### *A. Continuing Federal Jurisdiction Over Indian Country Crime*

While the TLOA seeks to improve law enforcement on Indian reservations, it nonetheless leaves primary jurisdiction over reservation crime in federal hands while seeking to improve cooperation between federal and Indian law enforcement. To accomplish its goals, the TLOA requires enhanced coordination and cooperation between the Justice Department, the BIA, and tribal communities in the investigation and prosecution of Indian Country crimes.[170] For instance, the TLOA seeks to improve collection and sharing of reservation crime data and criminal history information among federal, state, and tribal law enforcement.[171] It provides tribal law enforcement with access to national crime databases, thereby ensuring that tribal police have access to vital criminal history information about suspects.[172] It also expands the authority of tribal police to investigate crimes by non-Indians through deputization agreements with local or federal law enforcement agencies.[173]

To further facilitate federal-tribal cooperation, the TLOA requires every federal district that includes Indian Country to appoint at least one U.S. Attorney to serve as a tribal liaison to coordinate prosecution of crimes occurring on Indian reservations.[174] Tribal liaisons are also tasked with developing relationships with reservation residents and facilitating residents' interactions with the federal justice system.[175] Specifically, the

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169. Dorgan Press Release April 2009, *supra* note 166. In drafting the TLOA, the Senate Committee on Indian Affairs held eight hearings on crime in Indian Country. 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan). From those hearings, the Committee "found recurring themes of insufficient resources for law enforcement agencies, inadequate responses to criminal activity, and ineffective communication and coordination." *Id.* at S4344 (statement of Sen. John Barrasso). The Committee consulted with law enforcement officials at the federal, state, and tribal level as well as with judges, crime victims and advocates, public defenders, and prosecutors. *Id.* at S4334 (statement of Sen. Byron Dorgan). From those meetings, the Committee drafted a bill designed to encourage a more aggressive response to reservation crime. Dorgan Press Release April 2009, *supra* note 166.

170. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

171. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 251, 124 Stat. 2258, 2297–99.

172. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

173. § 222, 124 Stat. at 2272–74.

174. Sec. 213, § 13(b), 124 Stat. at 2268–69.

175. *See* sec. 213, § 13(b)(2)(A), 124 Stat. at 2270.

liaison is to develop and maintain communication between federal officials and tribal leaders, tribal justice officers, and victims' advocates.[176] Tribal liaisons will also provide technical assistance and training to tribal officers on evidence gathering and techniques for victim and witness protection.[177] Despite the TLOA's specific provisions, it is not to be interpreted as limiting a U.S. Attorney from ultimately determining the liaison's duties necessary to serve a particular Indian community.[178] Further, to enhance the prosecution of minor crimes, U.S. Attorneys' offices are encouraged to appoint Special Assistant U.S. Attorneys to prosecute crime in Indian Country where crime rates exceed the national average or where the rate of declined prosecutions exceeds the average rate.[179] The TLOA encourages federal prosecutors to coordinate with federal courts to hold trials or other criminal proceedings in Indian Country.[180] Ultimately, the creation of Special Assistant Attorneys is left to the discretion of the individual office.[181]

The TLOA also expands and clarifies the authority of BIA officers to arrest suspected offenders for crimes committed on reservations.[182] Prior to TLOA passage, BIA officers could arrest without a warrant if the offense was committed in their presence or, in the case of a felony, if the BIA officer "ha[d] reasonable grounds to believe that the person to be arrested has committed, or [wa]s committing, the felony."[183] In the case of a misdemeanor involving domestic or dating violence, stalking, or violation of a protection order, an arrest could be made if an element of the offense included the use of force or threatened use of a deadly weapon, and if the officer had reasonable grounds to believe the person arrested

176. *See* sec. 213, § 13(d)(1)(A), 124 Stat. at 2269.

177. *See* sec. 213, § 13(b)(6) 124 Stat. at 2269. They will also provide seminars to train tribal officers as special law enforcement commissions, under which tribal officers will act under the direction of federal law enforcement officers. § 231, 124 Stat. at 2273–74.

178. Sec. 213, § 13(c), 124 Stat. at 2269 ("Nothing in this section limits the authority of any United States Attorney to determine the duties of a tribal liaison officer to meet the needs of the Indian tribes located within the relevant Federal district.").

179. Sec. 213, § 13(d)(1)(A), 124 Stat. at 2269.

180. Sec. 213, § 13(d)(1)(B), 124 Stat. at 2269.

181. *See* sec. 213, § 13(d)(1), 124 Stat. at 2269.

182. *See* 155 CONG. REC. S4333–34 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan). In Public Law 280 states, the authority to arrest depends on the jurisdiction. *See* JURISDICTION, *supra* note 111, at 4. Some states, such as Arizona, permit tribal officers to make arrests on tribal lands if the officer has completed State Police Academy. Other states, such as California, do not even recognize tribal officers. *Id.* at 96 n.60.

183. 25 U.S.C. § 2803(3) (2006).

had, or was committing, the offense.[184] For their part, tribal law enforcement complained that they lacked the authority to arrest non-Indians who committed crimes on reservation land.[185] As one tribal officer explained, this meant that if two men—one non-Indian and one Indian—committed the same offense in his presence, he could arrest one, but not the other.[186] Instead, his only recourse was to retain the offender[187] and refer the crime committed by the non-Indian to federal prosecutors, who rarely acted on referrals from tribal law enforcement.[188]

Under the TLOA, BIA officers will now have the authority to make a warrantless arrest if the crime is committed in their presence or if the offense is a federal crime and they "ha[ve] probable cause to believe the individual to be arrested has committed, or is committing, the crime."[189] Further, the TLOA enhances the Special Law Enforcement Commission program, which permits deputization of tribal officers to enforce federal laws.[190] The Secretary of the Interior is instructed to draft procedures for the development of cooperative agreement memoranda under which tribal officers would aid the enforcement of federal law on Indian reservations.[191] Further, the Secretary is required to draft—in consultation with tribal officials—criteria tribal officers must meet to qualify for inclusion

184. *Id.*

185. *See* Bressi v. Ford, 575 F.3d 891, 895–96 (9th Cir. 2009) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated* in United States v. Lara, 541 U.S. 193 (2004)), and concluding that "tribe accordingly is authorized to stop and arrest Indian violators of tribal law traveling on the highway . . . [but] tribal officers have no inherent power to arrest and book non-Indian violators" without some form of state authorization). Tribal police may only stop non-Indians to ascertain their Indian status. *See id*. at 895–96 ("In order to permit tribal officers to exercise their legitimate tribal authority, therefore, it has been held not to violate a non-Indian's rights when tribal officers stop him or her long enough to ascertain that he or she is, in fact, not an Indian."); *Legal Hurdles*, *supra* note 23.

186. *Legal Hurdles*, *supra* note 23.

187. *See Bressi*, 575 F.3d at 896 ("If the violator turns out to be a non-Indian, the tribal officer may detain the violator and deliver him or her to state or federal authorities."); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) (finding that tribal police may only detain non-Indian violators in order to deliver them to state or federal authorities when acting under tribal authority to exclude nonmembers from reservation).

188. *Legal Hurdles*, *supra* note 23; *see also* JURISDICTION, *supra* note 111, at 4 n.10.

189. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 211(c), § 4(3)(D)(ii), 124 Stat. 2258, 2266–67.

190. § 231, 124 Stat. at 2272–74.

191. *Id.*

in the Special Law Enforcement Commissions.[192] It is unclear, however, if the TLOA extends the authority of tribal police to arrest or detain non-Indians as the act specifies that "[n]othing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians."[193]

Addressing the epidemic of domestic violence and sexual assault in Indian Country specifically, the TLOA seeks to enhance training and coordination to aid the investigation and prosecution of crimes of sexual violence.[194] For instance, federal officials are required to notify tribal governments when a sex offender is released onto a reservation from federal custody.[195] Additionally, federal health and law enforcement agencies must develop consistent sexual assault protocols and appear to testify in tribal court prosecutions of sexual assailants.[196] Further, federal law enforcement officers are required to undergo specialized training in conducting interviews of sexual assault victims and in the collection and preservation of evidence in sexual assault cases.[197] According to Senator Dorgan, these provisions are designed to improve both federal and tribal prosecutions of sexual assault.[198]

### *B. Coordinating Federal and Tribal Law Enforcement*

The TLOA also seeks to strengthen tribal law enforcement through increased federal participation in tribal prosecutions, enhanced penalties available to tribal courts, and improved resources. Specifically, in the event federal law enforcement officers decline or terminate a criminal investigation, they are required to "coordinate with the appropriate tribal law enforcement officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime alleged."[199] Further, FBI officials must compile annual reports detailing each investigation declined or terminated and provide annual reports to Congress.[200] The disposition reports must detail the type of

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192. *Id.*

193. § 206, 124 Stat. at 2264.

194. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

195. § 261, 124 Stat. at 2299.

196. § 263, 124 Stat. at 2300; *accord* S. 797, 111th Cong. (as introduced Apr. 2, 2009); 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

197. § 262, 124 Stat. at 229; *accord* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

198. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

199. Sec. 212, § 10(a)(1), 124 Stat. at 2267.

200. Sec. 212, § 10(a)(2), 124 Stat. at 2267.

crime, whether the perpetrator or victim is Indian or non-Indian, and the reason the investigation was declined or terminated.[201] Similarly, the TLOA mandates that federal prosecutors coordinate with tribal prosecutors regarding any case over which the tribe has concurrent jurisdiction in advance of the expiration of the tribal statute of limitations.[202] If the U.S. Attorneys' Office declines to prosecute, it must coordinate with "tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime alleged."[203] Federal prosecutors must also report to the Native American Issues Coordinator every case declined for prosecution, including the type of crime, whether the victim or the accused is Indian or non-Indian, and the reason for declining to investigate or prosecute the offense.[204] The Issues Coordinator must then submit annual declination reports to Congress.[205]

Combined with increasing the possibility of tribal prosecutions, the TLOA also seeks to strengthen tribal justice systems. Specifically, the TLOA increases tribal courts' authority to punish offenders with from one-year to three-years imprisonment.[206] In conjunction with this provision, tribal courts are required to provide defense counsel to indigent defendants.[207] The TLOA also expands the authority of tribal police officers to arrest suspected offenders for crimes committed on reservations.[208]

To further assist tribal law enforcement, the TLOA contains specific provisions for increased investment in existing federal programs designed to assist tribal governments in investigating, prosecuting, and incarcerat-

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201. *Id.* This requirement is necessitated by the Justice Department's refusal to release data on the rates at which it declines to prosecute reservation crime. *See* Jalonick, *supra* note 165.

202. Sec. 213, § 13(b)(5), 124 Stat. at 2269; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

203. Sec. 212, § 2809(a)(3), 124 Stat. at 2267.

204. *Id.* at 2267–68. The newly created Native American Issues Coordinator will work within the Executive Office of the U.S. Attorneys of the Justice Department. Sec. 214, § 2811, 124 Stat. at 2271. This position is charged with coordinating all U.S. Attorneys responsible for prosecution of Indian Country crimes, as well as with "coordinat[ing the] prosecutions of crimes of national significance in Indian country, as determined by the Attorney General," and with serving as a liaison with other sections of the Justice Department and the Attorney General's Office. *Id.*

205. *Id.*

206. § 234, 124 Stat. at 2279–82; *accord* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

207. § 234, 124 Stat. at 2279–82; *accord* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

208. 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

ing offenders by improving courts, jails, youth programs, and policing efforts in Indian Country.[209] Tribes are permitted to enter into agreements with the Bureau of Prisons to transfer offenders convicted in tribal courts to the federal facilities.[210] Further, the TLOA sets aside $35 million for each year from 2010 to 2014 to provide grants to tribes to improve or build jails, to construct regional detention centers for long-term incarceration, to develop alternatives to incarceration, and to build tribal justice centers that would combine tribal police, courts, and corrections services to handle violations of tribal laws.[211] Under the Justice Department's Community Oriented Policing Services program, tribes could receive long-term or permanent grants to hire and train tribal police officers and for law enforcement equipment, weapons, and vehicles.[212]

Finally, the TLOA seeks to enhance reservation law enforcement in those circumstances where state jurisdiction applies, but where states lack either the resources or will to investigate or prosecute reservation crime. In such cases, a tribe could request federal support in the criminal investigation and prosecution.[213] Once the Attorney General consents to provide this support, the tribe's request will essentially grant concurrent jurisdiction to the United States.[214] Further, state and tribal governments are encouraged to "enter into cooperative law enforcement agreements [to] . . . combat crime in Indian country and nearby communities."[215]

Clearly, the TLOA is a step in the right direction. As Senator Dorgan acknowledges, the TLOA constitutes "initial steps to mend this broken system by arming tribal justice officials with the needed tools to protect their communities."[216] It does not, however, go far enough in providing tribal governments with the legal tools necessary to protect their communities from sexual predators.[217]

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209. *Id.*
210. § 234, 124 Stat. at 2279–82.
211. § 244, 124 Stat. at. 2294.
212. *Id.*
213. § 221(b), 124 Stat. at 2272.
214. *Id.*
215. § 222(3), 124 Stat. at 2272.
216. 155 CONG. REC. S4334 (daily ed. Apr 2, 2009) (statement of Sen. Byron Dorgan); *see also* Handler, *supra* note 33, at 263.
217. *See* Paul Schmelzer, *Bachmann Votes Against Act to Help Native American Police Combat Rape "Epidemic*," MN. INDEPENDENT (July 28, 2010), http://minnesotaindependent.com/61865/bachmann-votes-against-bill-to-help-native-american-police-combat-rape-epidemic (discussing tribal leaders' dissatisfaction with TLOA).

## III. HOW THE TLOA LEAVES THE JURISDICTIONAL KNOTS INTACTS AND INDIAN WOMEN AT RISK

Despite its well-meaning attempt to address the troubling epidemic of reservation crime, the TLOA does not go far enough to repair the fundamental problem that hinders effective law enforcement and that permits sexual assaults to flourish on reservations. Ultimately, the TLOA perpetuates a broken jurisdictional scheme by continuing to vest law enforcement responsibility in the hands of remote federal officials who have proven unlikely to investigate criminal complaints, to arrest suspects, or to prosecute offenders. A better approach would ensure local control of law enforcement so that those investigating and prosecuting crimes both better understand and are more accountable to crime victims and their communities.[218]

### *A. Out of Sight, Out of Mind: The Problem with the TLOA's Perpetuation of Federal Jurisdiction*

Off the record, federal law-enforcement officials admit that U.S. Attorneys view prosecution of reservation crime as a waste of prosecution resources.[219] Many simply find sexual assault cases insignificant compared to their usual cases involving terrorism, organized crime, drug offenses, and racketeering.[220] According to former U.S. Attorney Margaret Chiara, federal attorneys often balk at taking sexual assault cases, complaining that they "did not sign up for this," but instead had planned to handle white-collar crime, conspiracy, and drug cases.[221] Unfortunately, some federal judges echo these feelings, with some complaining that they would have "stayed in state court" if they had wanted to handle such cases.[222]

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218. Eid, *supra* note 20, at 44 (noting that proponents of tribal jurisdiction have argued that "the net effect of *Oliphant* was to discourage or even prevent tribes from taking greater responsibility for their own public safety"); *see also* SEN. DANIEL INOUYE, MAKING PERMANENT THE LEGISLATIVE REINSTATEMENT, FOLLOWING THE DECISION OF DURO AGAINST REINA (58 U.S.L.W. 4643, MAY 29, 1990) OF THE POWER OF INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER INDIANS, S. REP. NO. 102-168, at 7 (1991); Brief of Amici Curiae on Behalf of Eighteen American Indian Tribes at 16, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107) (noting that federal prosecutors lack incentives to deal with reservation crime); Schmelzer, *supra* note 217 (noting that crime is viewed as local issue best resolved by local authorities).

219. *Principles, Politics*, *supra* note 36.

220. *See* MAZE OF INJUSTICE, *supra* note 13.

221. *Justice Broken*, *supra* note 13; *Bill Moyers Journal*, *supra* note 13.

222. *Justice Broken*, *supra* note 13.

But it is just these sorts of "pedestrian" offenses—aggravated assault, domestic violence, and sexual assault—that make reservations "places of unrelenting, low-level violence" and that "wear[ ] down" the lives of residents.[223] Nevertheless, the persistent perception that crime on Indian reservations is not a priority for the Justice Department seems to have taken hold.[224] Rather than being viewed as an essential service to a crime-ridden community, prosecution of reservation crime is dismissed as serving too small of a population and taking scarce federal resources away from more pressing national priorities such as terrorism and immigration.[225] This perception is borne out by statistics showing that U.S. Attorneys' offices refuse more cases from the BIA than from almost any other federal agency.[226] Indeed, federal prosecutors decline to prosecute more than twice as many reservation crimes as they do non-reservation crimes over which they also have jurisdiction.[227]

Far from being an isolated problem, the low priority given to policing Indian Country is reinforced by Justice Department policies.[228] For instance, according to one federal attorney, prosecution of Indian Country crime is not part of the criteria used to evaluate individual attorneys.[229] Instead, it is the cases involving terrorism, organized crime, major-drug cases, and white-collar crimes that are used to measure performance.[230] Thus, it is no wonder that some federal attorneys consider prosecution of

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223. *Principles, Politics*, *supra* note 36 (quoting current federal prosecutor who declined to be named).

224. *See id.*

225. Jalonick, *supra* note 165; *Principles, Politics*, *supra* note 36.

226. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 33 (2003) (table details that cases from the BIA are declined at a rate of 58.8 percent).

227. *Justice Broken*, *supra* note 13 (The author created the statistics based on data from "the Interior Department and the Transactional Records Access Clearinghouse, or TRAC, at Syracuse University.").

228. Equally worrisome is the apparent lack of knowledge of the federal role in prosecuting reservation crime. One former U.S. Attorney described a conversation with a high-ranking Justice Department official who asked him to explain why he was involved in prosecuting a double murder on the Navajo Reservation. *Principles, Politics*, *supra* note 36. The official seemed entirely unaware of the Justice Department's role as the sole prosecutor of major crimes on Indian reservations. *Id.*

229. *Principles, Politics*, *supra* note 36 (quoting a current federal prosecutor who declined to be named that "[o]ne criterion that has never been on the list is Indian Country cases").

230. *Id.*; *see also* Joe Hanel, *Justice Department to Help Tribes*, DURANGO HERALD, Sept. 22, 2009 (explaining that the Justice Department may begin including handling of Indian cases part of assessment of federal attorney's job performance in effort "to change the culture of the Justice Department when it comes to Native American issues" so that Indian cases stay priority regardless of presidential administration).

crimes such as sexual assault on reservations as "career killers" and opt to pursue more professionally valuable cases.[231] While the TLOA provides that evaluations of tribal liaisons will include performance of their obligations to Indian reservations, that provision does not necessarily apply to those federal prosecutors who are not designated as tribal liaisons.[232]

Furthermore, vesting jurisdiction in remote federal prosecutors raises myriad unnecessary challenges to law enforcement. Many reservations are remote, isolated communities far from urban centers where FBI and U.S. Attorneys' offices are likely to be located.[233] The remoteness and

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231. *Principles, Politics*, *supra* note 36. Federal prosecutors who nonetheless persist in pressing for increased efforts to curtail reservation crime are met with resistance from Justice Department officials. *Id.* For instance, when one prosecutor attempted to have the FBI record interviews with child sexual assault victims he was ordered to "back down" by Department officials. *Id.* Even more telling was how a drive to improve prosecution of reservation crime led to the termination of five U.S. Attorneys. Brought to light in the 2007 scandal involving the termination of eight Justice Department lawyers by the Bush administration was the firing of five attorneys who had been pressing the Justice Department to more aggressively pursue prosecutions of crime in Indian Country. *Id.* In her congressional testimony, former White House liaison Monica Goodling confirmed that one of those attorneys had been terminated because "he spent an extraordinary amount of time" on American Indian issues. *Continuing Investigation into the U.S. Attorneys Controversy and Related Matters (Part I) Before the H. Comm. on the Judiciary*, 110th Cong. 95 (2007). In a breathtakingly ironic twist, this attorney—fired for spending *too much time on Indian issues*—was the chair of the U.S. Attorneys' Native American Issues Subcommittee, "essentially the department's point man on improving the effectiveness of reservation prosecutions." *Principles, Politics*, *supra* note 36. These attorneys' terminations only confirmed the beliefs of tribal leaders that law enforcement on Indian reservations was a low priority for the Department, that it would avoid spending scarce resources on such law enforcement, that federal prosecutors were often ignorant of—if not downright hostile to—their responsibilities, and that any effort to change the status quo would be met with resistance and termination. *Id.* This is not to suggest that reservation crime was taken any more seriously under Democratic administrations. Rather, reservation crime does not appear to have been a priority to any administration. *Id.* Indeed, federal prosecutors have declined to prosecute nearly two-thirds of the felony cases from Indian Country for more than a decade. *Id.* Ultimately, many Indians see the failure to investigate and prosecute reservation crime as just another failure of the federal government to live up to its obligations to the tribes. *Id.*; *see also* 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan) ("The United States created this system. In so doing, our Government accepted the responsibility to police Indian lands, and incurred a legal obligation to provide for the public safety of tribal communities. Unfortunately, we are not meeting that obligation.").

232. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 213(b)(2)(B)(ii), 124 Stat. 2258, 2270 (2010).

233. SEN. DANIEL INOUYE, MAKING PERMANENT THE LEGISLATIVE REINSTATEMENT, FOLLOWING THE DECISION OF DURO AGAINST REINA (58 U.S.L.W. 4643, MAY

sheer size of most reservations can make investigation and prosecution difficult.[234] First, the closest federal court may be hundreds of miles away from the crime scene.[235] When a reservation is hours away from the courthouse where the trial will take place, federal prosecutors must transport witnesses, investigators, and the victim to the courthouse and house them during the duration of the trial.[236] Doing so can increase the costs of a trial by thousands of dollars, make witnesses less willing to cooperate, and further burden victims.[237] The TLOA does encourage federal prosecutors to coordinate with district courts to hold trials in Indian Country, but this is a goal, not a requirement.[238] While holding hearings and trials in Indian Country may ease the burden on victims and witnesses, it does little to hold down the costs or logistical burdens associated with transporting prosecutors, district court judges, and personnel from remote offices to reservations.

Second, this geographical remoteness makes it easy for federal agents to ignore the problem of reservation crime. As Senator Byron Dorgan explained, "some offices have taken an out-of-sight, out-of-mind attitude with regard to our obligation in Indian Country."[239] The perception that distance can impede prosecution is borne out by a General Accounting Office study that found that the further away a reservation was

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29, 1990) OF THE POWER OF INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER INDIANS, S. REP. NO. 102-168, at 7 (1991) ("Most Indian reservations are located far from urban centers, they are geographically isolated and remote, they are separated from state law enforcement centers by significant distances."); *Principles, Politics*, *supra* note 36; Gary Fields, *Tattered Justice: On U.S. Indian Reservations, Criminals Slip Through Gaps*, WALL ST. J., June 12, 2007, at A1 (cited in Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 214 (2008)); *see also* Pacheco, *supra* note 18, at 30.

234. Richmond, *supra* note 32; *Principles, Politics*, *supra* note 36; *see also* S. REP. NO. 102-168, at 7 ("The only practical means of providing an immediate law enforcement response to situations arising on the reservation has consistently been found to be that of tribal or local BIA police, with arraignment in tribal court, and confinement in tribal detention facilities.").

235. *Principles, Politics*, *supra* note 36; *see also* S. REP. NO. 102-168, at 7.

236. *Principles, Politics*, *supra* note 36; *see also* Pacheco, *supra* note 18, at 29–30; S. REP. NO. 102-168, at 7.

237. *Principles, Politics*, *supra* note 36.

238. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 213, § 13(d)(1)(C), 124 Stat. 2258, 2269 (2010).

239. Jalonick, *supra* note 165.

from an FBI field office, the more likely the U.S. Attorneys' Office would decline the case.[240]

In addition to geographic challenges, federal law enforcement agents also face social and cultural barriers in policing distinct communities whose traditions and cultures they may know little about. There are more than 560 federally recognized tribes,[241] each with varying traditions, cultures, social structures, and histories unfamiliar to federal officials.[242] Unfamiliarity with tribal cultural norms can adversely affect criminal investigation and prosecution even in those locations where tribal lands are not remote. Given the history of conflict between native and nonnative cultures, it may simply be difficult for Anglo officers to infiltrate tribes for investigation or undercover work.[243] Further, tribal members are apt to distrust federal law enforcement officials as a consequence of what one former federal attorney described as the "cultural memory of the violence and abuse that came with colonization of the West."[244] Put more plainly by the head of Justice and Regulatory Affairs of the Southern Ute Tribe, "you've taken our land; you've taken our water. How can we trust that you'll take this case and take these people dear to our hearts and really take care of them?"[245] Because federal officers are considered untrustworthy outsiders, residents may not be forthcoming in their statements, limiting the ability of federal officers to pursue an investigation.[246]

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240. *See* U.S. GEN. ACCOUNTING OFFICE, INFORMATION ON MAJOR CRIMES ON THREE MONTANA RESERVATIONS 25, 28–31 (1989).

241. *See* Kathleen A. Ward, *Before and After the White Man: Indian Women, Property, Progress, and Power*, 6 CONN. PUB. INT. L.J. 245, 254 (2007); National Tribal Justice Resource Center, *Tribal Court History*, http://www.tribalresourcecenter.org/tribalcourts/history.asp (last visited Feb. 15, 2010).

242. *See* SEN. DANIEL INOUYE , P.L. 102-137, MAKING PERMANENT THE LEGISLATIVE REINSTATEMENT, FOLLOWING THE DECISION OF DURO AGAINST REINA (58 U.S.L.W. 4643, MAY 29, 1990) OF THE POWER OF INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER INDIANS, S. REP. NO. 102-168 at 7 (1991); Brief of Amici Curiae on Behalf of Eighteen American Indian Tribes, *supra* note 218, at 16 (suggesting that tribal law enforcement is in better place to police reservations because of its familiarity with tribal customs); Roberts, *supra* note 31, at 549.

243. Richmond, *supra* note 32.

244. *Principles, Politics*, *supra* note 36.

245. *Id.* (internal quotations omitted).

246. *Justice Broken*, *supra* note 13. Of course this distrust runs both ways, and tribal law enforcement is not without fault. *Id.* For their part, tribes may hesitate to refer offenders to federal or state law enforcement out of fear that their reservations will be considered unsafe or that they will be viewed as ceding their sovereignty. Richmond, *supra* note 32. For instance, in the 1990s, tribes resisted efforts to increase the number of federal agents assigned to police Indian Country out of fear of increased in federal power. *Justice Broken*, *supra* note 13. Similarly, efforts to shift more policing responsibility to the tribes have not always been met with enthusiasm by tribal gov-

Tribal police from within the community are often in a better position to conduct investigations and convince victims and witnesses to come forward, and thus to more effectively police reservations.

The low priority given to policing and prosecuting reservation crime is reflected in the high crime rates in Indian Country and the overwhelming failure of federal officials to investigate or prosecute those offenses. In interviews, U.S. Attorneys contend that they pursue all reported crimes,[247] but Justice Department statistics suggest otherwise. Even while crime on reservations has increased substantially in the last decade, investigations of crime on Indian reservations has actually declined by as much as 20 percent.[248] Indeed, the likelihood of an arrest being made following a rape report differs dramatically between Indian Country and the rest of the United States. Of reported rapes nationwide in 2006, 26 percent led to an arrest,[249] but of those rapes reported from Indian Country in 2006, only 7 percent led to an arrest.[250] In the tiny percentage of cases where an arrest is made, it is unlikely the accused will ever face criminal prosecution. Rather, federal prosecutors decline to prosecute three-quarters of adult rapes referred to them by tribal governments.[251] Consequently, the

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ernments, which hesitate to incur the costs or to professionalize their police forces. Richmond, *supra* note 32.

247. *Legal Hurdles*, *supra* note 23.

248. According to the Justice Department, investigations of crime on Indian reservations declined by 21 percent between 1997 and 2000. PERRY, *supra* note 31, at 19.

249. *See* FBI, 2006 CRIME IN THE UNITED STATES (2007), *available at* http://www2.fbi.gov/ucr/cius2006/offenses/violent_crime/forcible_rape.html. In 2006, there were an estimated 92,455 forcible rapes reported to law enforcement nationwide. *Id.* Of those, there were 24,535 arrests. FBI, 2006 CRIME IN THE UNITED STATES: TABLE 29 (2007), *available at* http://www2.fbi.gov/ucr/cius2006/data/table_29.html.

250. Michael Riley, *Lawless Lands: Justice: Inaction's Fatal Price*, DENV. POST, Nov. 12, 2007, at A1. For aggravated assault, only 4 percent of perpetrators were arrested. *Id.* For lesser crimes, the numbers are even lower—only sixteen arrests were made out of 4,565 reports of burglary. *Id.* This data does not come from the Justice Department, which has refused to release data on the rates at which it declines to prosecute reservation crime. Jalonick, *supra* note 165. Rather, the statistics were compiled by the *Denver Post* team who assisted Michael Riley in his *Lawless Lands* series. *See Bill Moyers Journal*, *supra* note 13 (interview with Michael Riley). They received data from the Transactional Records Access Clearinghouse, or TRAC, at Syracuse University and cross-referenced it with data from the FBI and the BIA. *Id.*

251. *See Bill Moyers Journal*, *supra* note 13 ("[Sixty-five percent] of the complaints that are filed are just rejected out of hand by federal prosecutors. That's an astounding number.") (reviewing the data compiled by the *Denver Post*); *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan describing declines between 2004 and 2007). In cases of child sexual offenses, federal prosecutors decline 72 percent of cases. *Id.* For Native Alaskan women the rate of prosecution is even lower: in "approximately 90 percent of cases where women un-

vast majority of sexual assaults occurring on Indian reservations go unpunished, victims are left without any law enforcement protection, and reservations become safe havens for sexual predators to attack their victims with little fear of punishment.[252]

It is difficult to imagine that such dismal rates of arrest and prosecution would be tolerated in any other community in the United States.[253] In those communities, however, citizens can demand more from their law enforcement officials, appeal to their elected leaders for change, or vote to change recalcitrant leaders.[254] In Indian Country, this principle of local policing has been turned on its head, with devastating consequences for Indian tribes in general and Indian women in particular. Instead of a police force that dwells within the community it polices, jurisdiction is vested in officers hundreds of miles away, who are not only geographically, but also politically remote from the communities they are charged with protecting.[255] Thus, appeals to elected officials and local law enforcement are of little use when the community's law enforcement is controlled by outsiders largely unaccountable to tribal citizens.

The TLOA attempts to increase federal accountability by imposing stricter reporting requirements. Under the TLOA, the FBI must compile data on all decisions to not refer a case to federal prosecutors and report

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dergo forensic exams[,] there is no prosecution." EXECUTIVE SUMMARY, *supra* note 35, at 6. Indeed, rates at which prosecutors decline to prosecute vary depending on district. *See Justice Broken*, *supra* note 13 (chart detailing varying rates of declinations in different districts).

252. *See Bill Moyers Journal*, *supra* note 13; Handler, *supra* note 33, at 263 ("As a result of this broken system of justice, the prevalence of violent crime within Indian communities is formidable.").

253. *See Bill Moyers Journal*, *supra* note 13 ("What would we do if the district attorney for Denver, if we learned that he was declining 65% of cases? Well, it would be an outrage, it would be enough to send the citizenry into the streets."); *see e.g.*, HUMAN RIGHTS WATCH, TESTING JUSTICE: THE RAPE KIT BACKLOG IN LOS ANGELES CITY AND COUNTY 2009, *available at* http://www.hrw.org/sites/default/files/reports/rapekit_0309web.pdf (describing Los Angeles's increase in 2007 arrest rate of 28 percent as reversal of "worrisome trend" from 2006 where rate was 26 percent).

254. Schmelzer, *supra* note 217 ("The reason that crime is a local issue in the United States is that then you can hold local people accountable.") (internal quotations omitted).

255. SEN. DANIEL INOUYE, P.L. 102-137, MAKING PERMANENT THE LEGISLATIVE REINSTATEMENT, FOLLOWING THE DECISION OF DURO AGAINST REINA (58 U.S.L.W. 4643, MAY 29, 1990) OF THE POWER OF INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER INDIANS, S. Rep. 102-168, at 7 (1991); Brief of Amici Curiae on Behalf of Eighteen American Indian Tribes, *supra* note 218, at 16 (noting that federal prosecutors lack incentives to deal with reservation crime).

this information to Congress on an annual basis.[256] Similarly, federal prosecutors must compile information on all cases that they declined to prosecute.[257] Cases declined for prosecution must be reported to the Native American Issues Coordinator, who is tasked with annually report declinations to Congress.[258] Through this reporting mechanism, the TLOA seeks to create an incentive for federal officials—who are far removed from Indian reservations, who must balance competing priorities, and who may lack any affinity for tribal populations—to nevertheless police those communities.[259]

Such an incentive however, is no substitute for the increased legitimacy and sense of accountability that occur when a community is policed by members from within that community.[260] Simply put, requiring annual reports be sent to a remote Congress is a poor proxy for direct responsibility to a voting constituency.

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256. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 212, § 10(a)(2), 124 Stat. 2258, 2267–68; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

257. *See* sec. 212, § 10(a)(3), (b), 124 Stat. at 2267–68; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

258. *See* sec. 212, § 10(a)(4), 124 Stat. at 2267; *see also* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

259. *See All Things Considered: Bill Bolsters Tribal Powers to Prosecute Rape Cases* (NPR radio broadcast July 23, 2008), *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=92833011 [hereinafter *Bill Bolsters Tribal Power*]; *see also* Roberts, *supra* note 31, at 548–49 (noting that tribal leaders argue that "the federal government does not have as big an incentive to prosecute these types of cases as do the tribes due to a lack of knowledge of the culture and community, and an overburdened docket").

260. *See* United States v. Wheeler, 435 U.S. 313, 331 (1978), *superseded by statute*, 25 U.S. C. § 1301(2), *as recognized by* United States v. Lara, 541 U.S. 193 (2004) ("[Tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation."); S. REP. NO. 102-168, at 7 ("The only practical means of providing an immediate law enforcement response to situations arising on the reservation has consistently been found to be that of tribal or local BIA police, with arraignment in tribal court, and confinement in tribal detention facilities."); Brief of Amici Curiae on Behalf of Eighteen American Indian Tribes, *supra* note 218, at 16 ("Tribes have the incentive and are the logical jurisdictional authority to deal with misdemeanor crime."); Roberts, *supra* note 31, at 548–49 (noting that tribal leaders "argue that tribes have greater incentive to police their territory than the federal government does because "they know the territory and the people, and their presence fosters deterrence and a sense of community pride and responsibility."); *see also* Sarah E. Waldeck, *Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1254–55 (2000) (describing the benefit of community policing).

Nor is the TLOA's creation of tribal liaisons likely to compensate for a distant law enforcement unaccountable to the local constituency. Under the TLOA, a primary duty of tribal liaisons is facilitating communication between tribal residents and federal law enforcement.[261] But at one end of such communications are federal officials who ultimately remain far removed from reservation life and thus, from the consequence of their law enforcement decisions. Moreover, while the liaisons' duties are seemingly set by the TLOA, each liaison's actual duties are ultimately left to the discretion of each individual U.S. Attorneys' Office.[262] With chronic underfunding for tribal law enforcement and competing law enforcement priorities faced by each U.S. Attorneys' Office, it is difficult to discern what this discretion will mean in the long run for reservation law enforcement.

Further, declination reports and tribal liaisons cannot overcome the physical distance between federal law enforcement and Indian reservations that may impede the collection of evidence. The TLOA seeks to close this distance by providing for Special Law Enforcement Commissions for tribal police officers. Under that provision, tribal officers may be deputized to enforce federal laws on tribal lands, possibly including the right to arrest non-Indians and to conduct investigations.[263] However, before they can be certified, tribal officers would have to satisfy Interior Department criteria for certification.[264] At this point, it is unclear what those criteria will be or how many tribal officers will meet them.[265] Once certified, tribal police will be acting under color of federal authority and not pursuant to tribal sovereignty. It is uncertain, however, whether they will be authorized to conduct independent investigations or will be limited to those investigations authorized by federal law enforcement officials. If the latter, then tribal police will continue to be hobbled by the lower priority traditionally given to federal policing of Indian reservations.

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261. *See* sec. 213, § 13(b), 124 Stat. at 2268–69.

262. *See* sec. 213, § 13(c), 124 Stat. at 2269 ("Nothing in this section limits the authority of any United States Attorney to determine the duties of a tribal liaison officer to meet the needs of the Indian tribes located within the relevant Federal district.").

263. § 231, 124 Stat. at 2272–74; *see* 25 U.S.C. § 2803 (2006).

264. *See* § 231, 124 Stat. at 2272–74.

265. Under the TLOA, the Secretary of the Interior has 180 days to establish procedures to enter into memoranda of agreement for the use (with or without reimbursement) of the personnel or facilities of a federal, tribal, state, or other government agency to aid in the enforcement or carrying out in Indian Country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws. § 231, 124 Stat. at 2272–74.

### *B. Half-Measures: Why the TLOA Ultimately Fails to Improve Tribal Policing*

The lower priority given to tribal law enforcement has resulted in inadequate policing resources on each reservation. Despite its trust responsibility to provide Indian tribes with federal law enforcement,[266] the United States provides significantly fewer law enforcement resources to native communities than are available in comparable nonnative rural communities.[267] According to testimony about a 2006 BIA gap analysis, "tribal police were staffed at [58] percent of need."[268] Consequently, fewer than three thousand federal and tribal law enforcement officers are responsible for policing fifty-six million acres of Indian Country.[269] This

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266. § 202 (a)(1), 124 Stat. at 2262 ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian Country."); 154 CONG. REC. H8456 (daily ed. Sept. 18, 2008) (statement of Rep. Herseth Sandlin) ("Law enforcement is one of the Federal Government's trust obligations to tribes."); 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan) ("[O]ur Government accepted responsibility to police Indian lands, and . . . to provide for the public safety of tribal communities.").

267. SOVEREIGN TRIBAL AUTHORITY, *supra* note 22, at 3. The BIA employs 334 officers in Indian Country. BRIAN A. REAVES & LUNN M. BAUER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETINS, FEDERAL LAW ENFORCEMENT OFFICERS, 2002, at 4 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fleo02.pdf. Nationally, there are thirty-two federal officers for every 1,000 persons. *Id.* at 1. By way of comparison, Amtrak is policed by 327 federal officers; the U.S. Mint by 375. *Id.* at 4. The Standing Rock Reservation that Leslie Ironroad called home covers 2.3 million acres, nearly twice the size of the state of Delaware, and includes four towns, eight communities, 2,500 miles of road, and 10,000 residents. Letter from Amnesty Int'l to Members of the U.S. Congress, (Dec. 5, 2009), *available at* http://www.amnestyusa.org/pdf/Cox_approps2008.pdf [hereinafter Amnesty Int'l Letter]. Nevertheless, the Reservation has only seven tribal officers and ten BIA officers to provide all the necessary law enforcement services for the entire Reservation. *Rapes High for Indigenous Women*, *supra* note 35; Amnesty Int'l Letter, *supra*. Consequently, the Reservation typically has only two officers—and often only one—on duty at any given time. MAZE OF INJUSTICE, *supra* note 13, at 43.

268. *Oversight Hearing to Examine Bureau of Indian Affairs and Tribal Police Recruitment, Training, Hiring and Retention Before S. Comm. on Indian Affairs*, 111th Cong. 2 (2010) (statement of Myra Pearson, Chairwoman, Spirit Lake Tribe). Adequate staffing would require hiring 1,854 additional police officers. *Id.*

269. § 202(a)(3), 124 Stat. at 2262; *accord* 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan); 154 CONG. REC. H8456 (daily ed. Sept. 18, 2008) (statement of Rep. Herseth Sandlin); Johnson, *supra* 31. For example, the staffing levels at Standing Rock are 66 percent below the number of officers in a comparable off-reservation rural area. Amnesty Int'l Letter, *supra* note 267.

"reflects less than [half] of the law enforcement presence in comparable rural communities."[270]

With such inadequate resources it is no wonder that on many reservations it can take days or even months for an officer to respond to a reported crime.[271] During that time, evidentiary leads can run cold, evidence itself can be lost, and victims can become discouraged and less likely to participate in the investigation.[272] Even before a decision to prosecute can be made, jurisdictional confusion can render that decision moot. Because jurisdiction depends on whether the victim or offender is Indian and precisely where the offense occurred—and because there may be concurrent jurisdiction—it is often difficult to determine who has law enforcement authority in a particular case.[273] As a result of this confusion, investigation leads can run cold or end up never being pursued.[274] In the case of sexual assault, the collection of evidence from the victim can be delayed to the point where it is no longer available while law enforcement officials attempt to sort out who has proper jurisdiction.[275]

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270. § 202(a)(3), 124 Stat. at 2262; *accord* 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

271. *Rape Cases Go Uninvestigated*, *supra* note 1; *see also* 155 CONG. REC. S4333 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan) ("The lack of police presence has resulted in significant delays in responding to victims' calls for assistance."). Nor is Standing Rock's inadequate staffing unique. For instance, the Lac du Flambeu Reservation has nine full-time and four part-time officers to police 3,000 residents living on 108 square miles. Richmond, *supra* note 32. Even more worrisome, at least one-third of all Alaska Native villages that are not accessible by road have absolutely no law enforcement presence at all. Tribal law enforcement resources vary wildly. For example, one Oklahoma tribe has a police force consisting of fourteen to fifteen officers. MAZE OF INJUSTICE, *supra* note 13, at 43. In contrast, other Oklahoma tribes have only two or three officers on their force. *Id.* The Cheyenne River Reservation has three officers per shift to police 15,000 residents living in nineteen separate communities spread out over an area the size of Connecticut. *Oversight Field Hearing on the Needs and Challenges of Tribal Law Enforcement on Indian Reservations Before H. Comm. on Natural Res.*, 110th Cong. 3 (2007) (statement of Joseph Brings Plenty, Chairman, Cheyenne River Sioux Tribe). Although the Cheyenne River Reservation is vast, that does not mean officers are not responding to crime reports. In 2006, officers on the Cheyenne River Reservation responded to 11,488 calls and made 11,791 arrests. *Id.* Nevertheless, it is typical for tribal police to respond in hours rather than minutes to an emergency call. *See, e.g.*, Gipp, *supra* 31.

272. *See* JURISDICTION, *supra* note 111, at 2.

273. *Id.*, at 2; *see also* Pierce, *supra* note 57.

274. JURISDICTION, *supra* note 111, at 2.

275. *See* EXECUTIVE SUMMARY, *supra* note 35; *see also* Pierce, *supra* note 57. The jurisdictional complexity can also discourage Indian women from wanting to report or make it difficult for them to know which authority to approach. *Legal Hurdles*, *supra* note 23; *see also* Pierce, *supra* note 57 (the jurisdictional issues "leav[e] Native American women confused"). In one case reported by Amnesty International, two women

While the TLOA seeks to bolster tribal police investigation and arrest ability,[276] the problems of remoteness in space and culture also cannot be solved simply by having tribal police conduct investigations prior to federal prosecution given the longstanding lack of cooperation and mistrust often evident in relations between each camp. Federal prosecutors complain that tribal investigations are substandard, give federal law enforcement an insufficient basis to continue the investigation, and that prosecutors receive incomplete case files that cannot support a prosecution.[277] In those cases where federal investigators have ceded investigative responsibilities to the tribe,[278] the federal perception of tribal police incompetence can mean the absence of any actual prosecution.[279] Federal prosecutors routinely decline such cases either because the victim has been subjected to too many interviews or because the interviews were not conducted by officers trained in interviewing child sexual assault victims.[280] Because few tribal officers have such training, this means that virtually every child rape case investigated by tribal officers will not be prosecuted.[281] However, it is "rare" for the FBI to become involved in investigating sexual assaults against Indian women.[282] When the FBI does become involved, its investigations are slow to start and, if an arrest is made, it is often delayed weeks or months after the warrant has issued.[283]

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were raped by three non-Indian men in 2005. EXECUTIVE SUMMARY, *supra* note 35, at 2. However, because the women were blindfolded during the attack, prosecutors doubted the women could identify whether the attacks occurred on federal, state, or tribal lands. *Id.* This meant prosecution was unlikely because proper jurisdiction could not be established. *Id.*

276. *See supra* Part II.B.

277. *See Justice Broken*, *supra* note 13; MAZE OF INJUSTICE, *supra* note 13.

278. For instance, in cases involving child victims over the age of nine. *Justice Broken*, *supra* note 13.

279. *See Justice Broken*, *supra* note 13. However, that a tribe has an assigned police presence does not guarantee that reservation crimes will be taken more seriously. On the Navajo Reservation, for instance, the Tribe's investigator works from his home, which is located thirty minutes from the reservation. *See Justice Broken*, *supra* note 13. Residents report that he and his staff will disappear from the reservation for months at a time. *Id.*

280. *See Justice Broken*, *supra* note 13.

281. *See id.*

282. EXECUTIVE SUMMARY, *supra* note 35, at 4.

283. *Id.* Prosecutors contend that the use of alcohol by victims, suspects, and witnesses makes cases harder to prove. *Justice Broken*, *supra* note 13. Indeed, U.S. Attorneys routinely decline to prosecute cases where alcohol is involved. *Principles, Politics*, *supra* note 36 (quoting current federal prosecutor who declined to be named). U.S. Attorneys defend these decisions, explaining that they may only pursue cases where there is sufficient probable cause and that they are "not in the business of taking cases we're going to lose." *Justice Broken*, *supra* note 13. All too often, how-

Finally, even when an investigation is conducted competently by tribal officers, a handoff to federal prosecutors is of little effect when those cases are unlikely to be prosecuted.[284]

Evidence passing in the other direction—from federal to tribal officials—may fare no better. While the TLOA requires that federal officials coordinate with tribal law enforcement regarding the status of the case and the use of evidence, it does not require that all evidence collected by federal officials be submitted to Indian officials.[285] Instead, the TLOA exempts the "transfer or disclos[ur]e [of] any confidential, privileged, or statutorily protected communication, information, or source to an official of any Indian tribe."[286] Consequently, tribal law enforcement may be required to cover old investigative ground in an effort to collect evidence already in federal hands that was not turned over because of concerns of confidentiality or privilege. The result is further delay in the tribe's investigation and prosecution of reservation crime to the detriment of tribal citizens.

The TLOA does contain several provisions that seek to ensure more tribal prosecutions for those cases declined by federal prosecutors. For instance, the TLOA requirement that federal investigators and prosecutors notify tribal governments when they decline to investigate or prosecute a sexual assault case would at least provide tribal law enforcement an opportunity to investigate or prosecute the offense at the tribal level.[287] Currently, tribal prosecutors report that they are rarely told that a case has been declined, and that cases often languish for three to five years.[288]

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ever, law enforcement officials simply assume alcohol was a factor, blaming Indian women for attacks on the often mistaken belief that the victim was intoxicated as if that excuses the offense. MAZE OF INJUSTICE, *supra* note 13, at 47. For example, in July 2006 an Alaska Native woman reported to the police that she had been raped by a non-Native man. *Id.* at 1 "She gave a description of the alleged perpetrator and city police officers told her that they were going to look for him." *Id.* When the police did not return, she went to the emergency room for treatment. *Id.* "[T]he woman had bruises all over her body and was so traumatized that she was talking very quickly." *Id.* She was given some painkillers and money to go to a non-Native shelter, which turned her away because they assumed that she was drunk. *Id.* A support worker noted this case as an example of "why Native women don't report. It's creating a breeding ground for sexual predators." *Id.*

284. *See Bill Moyers Journal*, *supra* note 13; *Principles, Politics*, *supra* note 36.

285. An earlier version of TLOA required that federal law enforcement turn over all evidence relevant to the investigation and prosecution of the alleged offense. *See* S. 797, 111th Cong., sec. 102, § 10(a)(1)(A), (2)(A) (as introduced in the Senate, Apr. 2, 2009).

286. Tribal Law and Order Act of 2010, sec. 212, § 10(c)(1), 124 Stat. 2258, 2268.

287. Sec. 212, § 10(a)(1), (3), 124 Stat. at 2267.

288. *Bill Moyers Journal*, *supra* note 13.

Nor are victims likely to be kept informed of the status of the investigation or prosecution, including whether the suspect has been arrested.[289]

However, because it applies in only those cases where the tribe has concurrent jurisdiction, this notification provision is of limited usefulness in cases involving serious felonies such as rape and sexual assault. The TLOA does not grant tribes jurisdiction over non-Indians in felony cases.[290] Thus, tribal courts could only prosecute those cases involving Indian perpetrators. But, more than 80 percent of sexual assaults are committed by non-Indians over whom the tribes have no jurisdiction whatsoever.[291] Because non-Indians account for all but 20 percent of the sexual assaults on Indian reservations, requiring federal officials to refer cases to tribal prosecutors is largely an empty gesture that does little to address the real epidemic of sexual assault.[292]

Even for those cases delegated to the tribes that involve Indian defendants, tribal courts are still limited in their ability to meaningfully punish offenders by sentencing restrictions under ICRA.[293] The TLOA increases tribal courts' authority to punish offenders, but only to a maximum thirty-six months imprisonment.[294] The exceedingly weak penalties available to tribal prosecutors to punish such serious offenses as rape and sexual assault make such an option meaningless. Nationally, the average sentence for rape is 136 months, while the average for other sexual assaults is ninety-two months.[295] Thus, a sexual offender who commits his crime in Indian Country would be subject to one-third to one-quarter the penalty if he had committed the same offense outside Indian Country or

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289. EXECUTIVE SUMMARY, *supra* note 35, at 4.

290. *See* § 206, 124 Stat. at 2264.

291. Pacheco, *supra* note 18, at 2–4. Moreover, most crimes are not even reported to federal officials. *Justice Broken*, *supra* note 13. Of nearly 6,000 aggravated assaults reported in 2006, fewer than 10 percent were referred to federal prosecutors. *Id.* Of those, less than half were prosecuted. *Id.* Specifically, "[o]f the nearly 5,900 aggravated assaults reported on reservations in fiscal year 2006, only 558 were referred to federal prosecutors, who declined to prosecute 320 of them." *Id.*

292. *See* SOVEREIGN TRIBAL AUTHORITY, *supra* note 22, at 1; *see also* PERRY, *supra* note 31, at 22 (showing that 86 percent of perpetrators are non-Indian men).

293. See discussion *supra* accompanying notes 98–110 regarding question of whether tribes have concurrent jurisdiction over Indian offenders in felonies under the MCA.

294. Sec. 234(a)(2)(B), § 202(7)(C), 124 Stat. at 2279–82; *accord* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan).

295. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 527 n.81 (2008) (citing MATTHEW R. DUROSE & PATRICK A. LANGMAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS 2000 4 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc00.pdf).

if he had been prosecuted by the state or federal government. It is difficult to imagine that this provision will do much to change a reservation criminal justice scheme that "has been increasingly exploited by criminals" precisely because enforcement is so weak.[296] Tribal prosecutors correctly complain that they cannot pursue felony charges regardless of the conduct of the perpetrator.[297] The TLOA does little to remedy this.[298]

Moreover, a scheme that divides jurisdiction or that places tribal police under the direction of federal law enforcement agencies is likely to exacerbate any tendency toward law enforcement jurisdictional turf-fighting. On any Indian reservation, jurisdiction is already divvied between an inordinate number of agencies. In addition to tribal law enforcement and possible state jurisdiction, the various federal officers who may operate within Indian Country include the FBI, Drug Enforcement Administration (DEA), BIA, as well as officers associated with other federal agencies.[299] This type of jurisdictional overlap can create confusion that

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296. § 202(a)(4)(B), 124 Stat. at 2262.

297. *Legal Hurdles*, *supra* note 23; *see also* Pacheco, *supra* note 18, at 2–3 (explaining tribes lack of prosecutorial power).

298. Some tribes have prosecuted sexual assault offenders in tribal court, charging them with multiple charges and seeking consecutive one year sentences for each offense. EXECUTIVE SUMMARY, *supra* note 35, at 6. However, recent court cases have suggested that tribal courts may not impose consecutive sentences that result in longer than one year penalties. *See* Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005); Miranda v. Nielson, CV 09-8065-PHX-PGR, 2009 U.S. Dist. LEXIS 122933 (D. Ariz. Dec. 14, 2009); Bustamante v. Valenzuela, 715 F. Supp. 2d 960 (D. Ariz. 2010). Tribes also impose non-incarceration penalties such as community service, restitution, or probation. EXECUTIVE SUMMARY, *supra* note 35, at 6; *see also* Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N.D. L. REV. 1 (2008). Again, however, none of these sanctions can apply to non-Indian offenders. *See* discussion *supra* Part I.C.

299. COHEN'S HANDBOOK, *supra* note 57, § 9.07, at 763. Even before the TLOA, tribal police and state law enforcement officers have worked together to combat reservation crime. *See* Richmond, *supra* note 32. FBI agents have also formed task forces with local tribes to deal with reservation crime. *See id.* Perhaps even more promising, in Wisconsin in 2009, eight tribes joined together with Wisconsin law enforcement officials to form a multi-tribe and state law enforcement task force labeled the Native American Drug and Gang Initiative (NADGI). *Id.* NADGI is the first such program in the nation and participants hope that it becomes a model for other states. *Id.* Generally, it is believed that such cooperative arrangements aid law enforcement. However, attempts to join forces with local law enforcement are not always warmly received, with some local officials refusing to cooperate. *Legal Hurdles*, *supra* note 23. For instance, one attempt to join Wisconsin tribes in a law enforcement task force met with some resistance when a tribe insisted that other task force members abide by its ordinances on its reservation lands and prohibited task force officers from conducting

impedes rather than aids in law enforcement efforts. For instance, in one case an Indian woman called the police after she was assaulted to say that her attacker was hiding in her closet.[300] When a victim's advocate arrived, she found four different law enforcement agencies in front of the house with the victim, arguing over who had jurisdiction to apprehend her assailant.[301] Under the TLOA, tribal officers could be designated as serving any of those agencies in addition to their tribal governments. Stereotypical jurisdictional squabbles flare up in encounters between all law enforcement agencies.[302] Any predisposition to territoriality is only compounded by the jurisdictional rules that make it difficult for law enforcement agencies to determine who has proper jurisdiction, especially given the myriad law enforcement agencies that may have responsibilities on any particular reservation.[303] Tribal officers operating under a Special Law Enforcement Commission could be caught in the middle of a confused jurisdictional spat, attempting to satisfy multiple—and possibly conflicting—sets of priorities. The fragmenting of law enforcement responsibility also undermines the credibility of tribal law enforcement by suggesting to citizens that tribal police are not competent or credible protectors of their communities without federal assistance or sponsorship.[304]

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investigations or making arrests without a tribal officer's participation. Richmond, *supra* note 32. Local officers may question the competency of tribal police or be reluctant to share responsibilities with officers who are not in their chain of command. *Legal Hurdles*, *supra* note 23. The extent of resistance can be extreme. One sheriff in Ada, Oklahoma, told his deputies that they were not to call on tribal law enforcement even if they found themselves wounded and "bleeding to death" on the side of a road. *Id.* It is hard to dismiss a perception of racism given such an extreme aversion to working with Indian police. *See id.* The TLOA may allay some of these concerns, however, by providing more thorough training for tribal police officers.

300. *Legal Hurdles*, *supra* note 23.

301. *Id.*

302. Richmond, *supra* note 32; EXECUTIVE SUMMARY, *supra* note 35, at 4 ("Jurisdictional issues present some of the biggest problems in law enforcement response . . . .")

303. Blumenthal, *supra* note 22.

304. The tribes are not without responsibility for the current state of tribal law enforcement. For decades, there have been efforts to have tribal police take on more responsibility for reservation law enforcement. *Justice Broken*, *supra* note 13. But, the tribes have not always been willing to fund these efforts or to fully professionalize its police force. *Id.* Some tribes may not be willing—or may simply be financially unable—to pay for increased tribal law enforcement. *Id.* Thus, better funding for law enforcement and functioning tribal economies are essential for tribal jurisdiction to have a real effect on reservation crime. That topic is outside the scope of this article.

## IV. CUTTING THE KNOTS

Despite the devastating effects the current unworkable jurisdictional scheme has on reservation life, the TLOA ignores the most obvious solution, which is to authorize tribal governments to prosecute reservation crime regardless of the offense or perpetrator.[305] Tribal governments and tribal law enforcement are most familiar with the culture of the particular tribe. Further, because their political and personal fates are tied to their reservation communities, they can be held more directly accountable to those communities. This is the approach sought by many tribal leaders,[306] and it is one at least contemplated by the TLOA, which recognizes that "tribal law justice systems are ultimately the most appropriate institutions for maintaining law and order in tribal communities."[307] Nevertheless, this is a solution that Congress may be reluctant to grant because of fears that tribal courts cannot provide adequate justice to nonmembers.[308] The two primary legal impediments can be overcome if Congress chooses to act.[309]

The main impediment to tribal jurisdiction has been concern that accused defendants would not have the benefit of the full panoply of con-

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305. *See* Pacheco, *supra* note 18, at 39–41; Eid, *supra* note 20, at 44–46 (describing possible "post-*Oliphant*" world); *see also* Ennis, *supra* note 148, at 579–80 (describing the flaws in the consent theory of tribal jurisdiction).

306. *See Bill Bolsters Tribal Power*, *supra* note 259; *see also* Eid, *supra* note 20, at 44–45 (discussing support for efforts to repeal *Oliphant* to permit tribal jurisdiction over more offenses).

307. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(2)(B), 124 Stat. 2258, 2262. Nevertheless, the TLOA leaves the current complex of jurisdictional rules intact. Instead, the TLOA establishes an "Indian Law and Order Commission," which is tasked with undertaking a comprehensive study of criminal justice in Indian Country, including a review of the impact of jurisdictional complexities on investigation and prosecution of reservation crime. Sec. 235, § 15(a), (d), 124 Stat. at 2282. After this study, the Commission is to make recommendations based on its findings including consideration of simplifying jurisdiction over crimes on reservations. Sec. 235, § 15(e), 124 Stat. at 2284.

308. *See Bill Bolsters Tribal Power*, *supra* note 259. For their part, many tribes have long sought to manage their own tribal judiciaries. Shane Benjamin, *Tribes Fight for Judicial Independence*, DURANGO HERALD, June 14, 2009. In calling for judicial autonomy, some tribes seek to implement a more culture-bound approach to criminal justice. For example, rather than imposing prison terms, sentencing offenders to sweat lodges. *Id.* Still others would continue with the western model, but seek expanded jurisdictions to prosecute serious offenses. *Id.*

309. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004) (noting that jurisdiction was not proper without express grant from Congress). There are, of course, economic and political impediments, but those are not the focus of this article.

stitutional rights guaranteed by the Constitution.[310] This concern arises because tribal governments are not bound by the Bill of Rights.[311] Instead, tribal courts must comply with ICRA.[312] Passed in 1968, ICRA extends nearly all of the rights contained in the Bill of Rights to tribal governments.[313] In criminal prosecutions, tribal courts must provide most of the same due process rights defendants receive in federal or state courts.[314] ICRA also provides that defendants can challenge their detention as violative of ICRA through writs of habeas corpus in federal court.[315] ICRA does not, however, require that tribes provide indigent defendants with a right of appointed counsel.[316] This omission has been

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310. *Oliphant*, 435 U.S. at 211; *accord* Eid, *supra* note 20, at 44–45; Ennis, *supra* note 148, at 582–83; Wolpin, *supra* note 150, at 1080; *see, e.g.*, Patience Drake Roggensack, Plains Commerce Bank*'s Potential Collision with the Expansion of Tribal Court Jurisdiction by Senate Bill 3320*, 38 U. BALT. L. REV. 29, 37–38 (2008).

311. *See Oliphant*, 435 U.S. at 211; Roggensack, *supra* note 310, at 37–38; Wolpin, *supra* note 150, at 1080. "The United States Constitution, along with the Bill of Rights and the Fourteenth Amendment, serves to limit federal and state government by, among other things, countering some of the negative aspects of the state's allocation of force." M. Rhead Enion, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 520–21 (2009) (citing U.S. CONST. art. I, § 8, cls. 10–16 (delimiting the military powers of Congress); *id.* art. I, § 9, cl. 2 (providing for the writ of habeas corpus); *id.* art. II, § 4 (allowing for impeachment of executive officers); *id.* art. III, § 2, cl. 3 (requiring jury trials in criminal cases); *id.* art. III, § 3 (limiting the crime of treason); *id.* amend. IV (limiting searches and seizures); *id.* amend. V (requiring due process); *id.* amend. VI (requiring certain criminal procedures)).

312. Berger, *supra* note 124, at 1055; *see* 25 U.S.C. § 1301–03 (2006).

313. 25 U.S.C. § 1302; *see* Pacheco, *supra* note 18, at 19–20.

314. *See* 25 U.S.C. § 1302. That is, defendants have the right to be represented by counsel, the right to a jury trial for any offense, the right against self-incrimination, the right to confront witnesses, the right against double jeopardy, to be free from unreasonable search and seizure, right to know the charges, and to a speedy trial. *See id.* Interestingly, ICRA provides a jury trial for any "offense punishable by imprisonment," not simply those offenses punishable by more than six-months incarceration. *Compare* 25 U.S.C. § 1302, *with* U.S. CONST. amend. VI (guaranteeing jury trial only for offenses punishable by more than six-months incarceration).

315. 25 U.S.C. § 1303; *accord* Wolpin, *supra* note 150, at 1080.

316. *Compare* 25 U.S.C. § 1302, *with* U.S. CONST. amend. VI, *and* Gideon v. Wainright, 372 U.S. 335 (1963). The lack of such guarantees can create problems even when suspects are tried in federal courts, however, if tribal police initiated the investigation or arrest before handing the suspect over to federal authorities. The extent of the issue depends on when the federal constitutional rights are held to attach. See COHEN'S HANDBOOK, *supra* note 57, § 9.02, at 750–51 for discussion. Further, ICRA does not provide for a right of grand jury indictment. However, that is not a right that has been incorporated as against state governments. *See* Hurtado v. California, 110 U.S. 516, 534–38 (1884) (finding that right of grand jury indictment is not incorporated against states under the Fourteenth Amendment Due Process Clause). This de-

cited as a reason to prohibit tribes from prosecuting nonmembers.[317] But Congress could rectify this shortcoming by amending ICRA to include the right to appointed counsel.[318] Indeed, the TLOA requires that tribal courts provide defense counsel to indigent defendants in conjunction with increasing the penalties tribal courts may mete out.[319]

A further concern is that, unlike the Bill of Rights, the rights contained in ICRA and the TLOA are statutory as opposed to constitutional provisions.[320] Nevertheless, in a case where the tribe's Bill of Rights provided for appointed counsel to indigent defendants, the Ninth Circuit found that criminal prosecution of a nonmember Indian by a tribal court does not violate constitutional due process guarantees.[321] According to the court, while the Constitution did not bind the tribes, ICRA "confers all the criminal protections [defendants] would receive under the Federal Constitution."[322] Likewise, if Congress amended ICRA to require a right

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cision still stands. *See* Bruce A. Antkowiak, *The Rights Question*, 58 U. KAN. L. REV. 615, 624 n.35 (2010). Thus, defendants in state criminal courts are equally without a federal guarantee of that right.

317. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004); *see* Eid, *supra* note 20, at 44–45 (describing the need for additional protections for defendants in tribal courts as the first step to moving past *Oliphant*); Roggensack, *supra* note 310, at 37–38. "The United States Constitution, along with the Bill of Rights and the Fourteenth Amendment, serves to limit federal and state government by, among other things, countering some of the negative aspects of the state's allocation of force." Enion, *supra* note 311, at 520–21 (citing U.S. CONST. art. I, § 8, cls. 10–16 (delimiting the military powers of Congress); *id.* art. I, § 9, cl. 2 (providing for the writ of habeas corpus); *id.* art. II, § 4 (allowing for impeachment of executive officers); *id.* art. III, § 2, cl. 3 (requiring jury trials in criminal cases); *id.* art. III, § 3 (limiting the crime of treason); *id.* amend. IV (limiting searches and seizures); *id.* amend. V (requiring due process); *id.* amend. VI (requiring certain criminal procedures)).

318. *See* Eid, *supra* note 20, at 46.

319. Tribal Law and Order Act of 2010, sec. 234, § 202(c)(2), 124 Stat. 2258, 2280; *accord* 155 CONG. REC. S4334 (daily ed. Apr. 2, 2009) (statement of Sen. Byron Dorgan). Further, to ensure constitutional protections at the arrest and investigative stage, Congress could simply vest tribal police officers with federal authority, which would make them subject to the same Bill of Rights. *See* Bressi v. Ford, 575 F.3d 891, 896–98 (9th Cir. 2009) (holding that when tribal officers act under color of state law, they are bound by same constitutional provisions as state police officers).

320. *See* Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56–57 (1978)). Further, the sole remedy for an ICRA violation is habeas review. *Id.* at 932 n.49.

321. *Means*, 432 F.3d at 935.

322. *Id.* In so holding, the court also recognized that ICRA does not provide for a right to grand jury indictment, but noted that right was not implicated in that case. *Id.*

to appointed counsel, then defendants in Indian tribal courts would have the same rights as they would receive in a nontribal court prosecution.

Nevertheless, there remains the problem of a general distrust for the competency of tribal courts to adjudicate cases involving nonmembers.[323] In *Oliphant*, the Supreme Court expressed its concern that a tribe could not be fair in its exercise of jurisdiction over nonmembers. According to the Court, tribal jurisdiction was inappropriate because U.S. "citizens [must] be protected . . . from unwarranted intrusions on their personal liberty."[324] This concern, apparently, does not bar tribal jurisdiction over tribal members, who are also U.S. citizens, because the Court was primarily concerned with the cultural and racial divide between an Indian tribe and non-Indians.[325] Thus, the Court sought to avoid tribal jurisdiction "over aliens and strangers; over the members of a community separated by race [and] tradition . . . the restraints of an external and unknown code. . .which judges them by a standard made by others and not for them."[326]

Despite its concern over subjecting strangers to the jurisdictions of courts with which they were unfamiliar, the Supreme Court has declined to review a decision which held that a tribe had jurisdiction over a nonmember.[327] In *Means v. Navajo Nation*, Russell Means, an Oglala Sioux, challenged his conviction by a Navajo tribal court for battery against his

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323. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210–11 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004) (expressing concern that non-Indians would be subjected to tribal laws and procedures with which they were unfamiliar); Berger, *supra* note 124, at 1055–58 (describing *Oliphant*'s distrust); Roggensack, *supra* note 310, at 38–41 (describing why tribal criminal jurisdiction should be limited). While the concern about prosecuting non-Indians in tribal courts is perhaps understandable, there is also cause for concern about bias against Indian offenders or victims in federal court. In one case brought in state court against two men who raped, beat, and then threw the victim off a bridge, the jury was unable to reach a verdict. EXECUTIVE SUMMARY, *supra* note 35, at 5. When asked why, a juror replied that the victim "was just another drunk Indian." *Id.* Later, the case was retried and one perpetrator—who had raped at least four women previously—was sentence to sixty years in prison. *Id.* His accomplice received a ten-year sentence. *Id.*

324. *Oliphant*, 435 U.S. at 210; *see also* Ennis, *supra* note 148, at 555 (discussing *Oliphant*'s concern over limits on constitutional protections in tribal courts).

325. *Oliphant*, 435 U.S. at 210–11. *But see* Roberts, *supra* note 31, at 558–59 (discussing due process implications of subjecting nonmember Indians to tribal jurisdiction where they would not receive full due process protections).

326. *Oliphant*, 435 U.S. at 210 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).

327. *Means*, 432 F.3d at 924, *cert. denied* 549 U.S. 952 (2006); *accord* Roberts, *supra* note 31, at 557.

father-in-law, a member of the Omaha tribe, and his brother-in-law, a member of the Navajo Nation.[328] In his habeas petition, Means contended that the Navajo tribal court lacked jurisdiction over him because he was not a member of the Navajo Nation and was not a permanent resident of the Navajo reservation.[329] Although the 1990 ICRA amendments had granted tribal jurisdiction over "all Indians," Means contended that because the tribe could not prosecute a similarly situated non-Indian, permitting tribal jurisdiction over an Indian nonmember, ran afoul of the equal protection provisions in ICRA and the U.S. Constitution.[330]

In rejecting Means' petition, the Ninth Circuit Court of Appeals found that subjecting a nonmember Indian to tribal jurisdiction was not a racial classification, but a political one.[331] Considering ICRA Amendments in light of the MCA and earlier Supreme Court decisions, the circuit court concluded that criminal jurisdiction over "all Indians" as provided for by the 1990 amendments, meant to include "all [persons] of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians."[332] Although "Means's equal protection argument ha[d] real force," the court nonetheless rejected it on the ground that "federal statutory recognition of Indian status is 'political rather than racial in nature.'"[333]

More importantly, after determining that jurisdiction was premised on Indian political status rather than race, the court employed the "rational tie" standard articulated in *Morton v. Mancari* to determine whether subjecting nonmember Indians to tribal jurisdiction was rationally tied "to the fulfillment of Congress's unique obligation toward the

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328. 432 F.3d at 927.

329. *Id.*

330. *Means*, 432 F.3d at 931–33. ICRA amendments, 25 U.S.C. § 1301(2) (2006), are also known as the "*Duro*-fix." Cordiano, *supra* note 143, at 265; Roberts, *supra* note 31, at 544.

331. *Means*, 432 F.3d at 930. The court relied on the Supreme Court's decision in *United States v. Antelope*. 430 U.S. 641 (1977), in coming to its decision. *Means*, 432 F.3d at 930. In *Antelope*, the Court considered an equal protection challenge to the MCA. 430 U.S. at 642. Specifically, the petitioner alleged that prosecution by a tribal court—instead of by a more favorable state court—violated the Equal Protection Clause because a similarly situated non-Indian would have been prosecuted under state law. *Id.* at 646. In rejecting this challenge, the Court explained that the MCA applied not because of the petitioners' "race, but because they were enrolled members of the prosecuting tribe." *Id.* However, because the *Antelope* petitioners were enrolled tribal members, the Court did not consider whether enrollment was required for the MCA to apply. *Id.* at 646 n.7.

332. *Means*, 432 F.3d at 930 (internal quotations omitted).

333. *Id.* at 932; *see also* Morris v. Tanner, 160 F. App'x. 600, 601–02 (9th Cir. 2005) (applying *Means* to hold tribal jurisdiction over nonmember Indian proper).

Indians."[334] In finding that a rational tie did justify tribal prosecution, the court first noted that recognizing tribal jurisdiction would further Indian self-government because tribal jurisdiction was critical to the tribe's ability to "maintain order within its boundaries."[335] According to the court, ICRA was intended "to protect Indians and others who reside in or visit Indian country against lawlessness by nonmember Indians who might not otherwise be subject to any criminal jurisdiction."[336] This was especially true given the number of non-tribal members who lived on the Navajo reservation.[337] The court reasoned that if Means were not subject to the jurisdiction of the tribal court, he would escape prosecution altogether as there was no federal jurisdiction under the MCA and the state also lacked jurisdiction.[338] Thus, tribal jurisdiction was essential to ensure Means did not escape criminal responsibility.[339] Accordingly, "misdemeanor jurisdiction over nonmember Indians is rationally related to Indian self-government in an area where rapid and effective tribal responses may be needed."[340]

If tribal governments have a rational tie to policing misdemeanor offenses to maintain order within their borders, they have an even more compelling interest in prosecuting more devastating offenses like sexual assault.[341] Because non-Indians commit the vast majority of sexual assaults on Indian reservations, the prohibition on tribal authority to arrest or prosecute non-Indians means that tribes are unable to stop the victimization of Indian women.[342] Further, the perpetrators of sexual assault are largely escaping any prosecution.[343] In *Means*, the court was persuaded by fact that the federal government would not prosecute Means for battery

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334. *Means*, 432 F.3d at 932–33 (quoting Morton v. Macari, 417 U.S. 535 (1974)).

335. *See id.* at 933.

336. *Id.* Before the 1990 amendments, members of the Suquamish Tribe testified before Congress that since the Court's decision in *Duro*, "tribal police were openly taunted, and tribal law flaunted, by nonmember [sic] Indians." *Status of Jurisdictional Authority in Indian Country, an Assessment of Emerging Issues: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 39 (1991) (statement of Georgia George, Chairperson, Suquamish Indian Tribe).

337. *Means*, 432 F.3d at 933.

338. *Id.*

339. *Id.*

340. *Id.*

341. *See id.* ("The Navajo reservation, larger than many states and countries, has to be able to maintain order within its boundaries."); *see also* Pacheco, *supra* note 18, at 1 (describing rape of Indian women as "attacks on the human soul" and likening it "to the destruction of indigenous culture" as both are "a kind of spiritual death").

342. *See* PERRY, *supra* note 31, at 22 (noting that 80 percent of sexual assault perpetrators are alleged to be non-Indian).

343. *See* Pachecho, *supra* note 18, at 3.

because it was not a major crime under MCA.[344] The court was concerned that ultimately Means would escape any appropriate punishment.[345] But, even though federal jurisdiction does apply to sexual assault, the reality is that most assailants do escape prosecution and are left free to continue preying on Indian women. This result is utterly at odds with the congressional goal of furthering tribal governments' ability to maintain order within their boundaries.[346] As former U.S. Attorney Troy A. Eid explained, "[t]he law simply does not reflect the federal government's longstanding policy of promoting tribal self-determination with respect to other core governmental functions, such as [ensuring public safety]."[347]

Further, the concern the *Oliphant* court had for subjecting strangers to unfamiliar laws and court systems is no more of a concern simply because the accused is non-Indian. There are 562 federally recognized tribes, each with its own history, culture, and traditions.[348] That a person is Indian does not make him any less a stranger to another tribe's laws or courts. Indeed, contrary to the court's suggestion, Means' status as an Indian did not necessarily make him more politically entwined with the Navajo Nation. Rather, despite living on the Reservation for a decade before the charged conduct, Means was not a member of the Nation and was not eligible for membership because he lacked the requisite blood quantum and because he was an enrolled Oglala Sioux.[349] Means had no say in tribal government and was a political stranger to the Tribe's laws as he did not play a role in their enactment and had no political voice against them. Indeed, Means did not speak the Navajo language.[350] According to Means, he could not participate in tribal civic life: he was barred from holding political office, and from voting in tribal elections.[351]

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344. *Means*, 432 F.3d at 933.

345. *See id.*

346. Pacheco, *supra* note 18, at 3.

347. Eid, *supra* note 20, at 42; *accord* Pacheco, *supra* note 18, at 3.

348. Suzianne D. Painter-Thorne, *If You Build It, They* Will *Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 345–46, 345 n.327 (2010).

349. Petition for Writ of Certiorari, at 4, Means v. Navajo Nation, 432 F.3d 924 (2002) (No. 05-1614), 2006 WL 1696525 at *12. (citing Navajo Nation Code tit. 1, § 701–03).

350. *Means*, 432 F.3d at 927–28.

351. Petition for Writ of Certiorari, *supra* note 349, at 4–5. The Ninth Circuit acknowledged that the Navajo Supreme Court had found that Means could have served on tribal juries if he had registered to vote in Arizona. *Means*, 432 F.3d at 928. In addition, during the time Means resided on the Reservation and was married to a tribal member, he was connected by rights and obligations to his wife's "clan" as a "hadane," or in-law. *Id.* However, at the time of the charged offense, Means was no longer married to a Navajo member and no longer resided on the Reservation. *Id.* at

Means contended that he was essentially treated the same as any non-Indian, nonmember residing on the Reservation.[352]

Nevertheless, the court found tribal jurisdiction proper because of the Tribe's need to deter violence committed on its reservation by all those who reside or visit there.[353] This concern is of particular importance given reservation demographics. Currently, the average Indian reservation has more non-Indian residents than Indian residents.[354] On some of the most populous reservations, the vast majority of the reservation's residents may be nonnative.[355] Further, reservations that employ non-Indian workers or operate casinos or other businesses open to the public also have countless non-Indian visitors each day. Additionally, crime reports suggest that policing non-Indian residents or visitors is essential to combating reservation crime.[356] For instance, reports of sexual assault indicate that more than 80 percent of perpetrators are alleged to be non-Indian.[357] Given these demographic realities, prohibiting tribal jurisdiction over non-Indians means tribes are powerless to arrest or prosecute those most

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927. Further, as the Ninth Circuit pointed out, the Navajo Supreme Court had noted that being "a 'hadane' does not make one a Navajo." *Id.* at 928.

352. Petition for Writ of Certiorari, *supra* not 349, at 4–5. In *Oliphant*, the Court had been concerned that the Suquamish Tribe did not permit non-Indians to serve on criminal jury panels. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.4 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004). However, since that time, "many tribal courts . . . now require a 'fair cross-section of the community' standard for jury selection and service." Eid, *supra* note 20, at 46.

353. *Means*, 432 F.3d at 933. It was also important to the court that the Navajo Nation had a sophisticated court system and that there was no other avenue for prosecution because the charged offense was not included in the MCA, so federal jurisdiction did not apply. *Id.* As noted earlier, one bar to all tribes having competent court systems is financial. *See supra* note 304.

354. Berger, *supra* note 124, at 1071; *see also* Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, ADVANCE, Spring 2009, at 32, 35 ("Large numbers of people who are not tribal citizens reside or conduct business in Indian Country, or have Indian spouses and intimate partners who reside there."), *available at* http://www.acslaw.org/Advance%20Spring%2009/ACS_Advance_v3n1.pdf; Roberts, *supra* note 31, at 541 ("[A]s of 1990 on the average reservation, non-Indians made up almost half of the total population, and 'on nine of the most populated reservations, non-Indians vastly outnumbered Indians.'").

355. Berger, *supra* note 124, at 1071; *see also* Fletcher, *supra* note 354 at 35; Roberts, *supra* note 31, at 541.

356. *See* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 596 (2010) (noting that lack of jurisdiction over non-Indians leaves tribes powerless and with "little choice but to allow its territory to be used as a haven for criminal activity").

357. PERRY, *supra* note 31, at 22.

responsible for the epidemic of sexual violence in Indian Country.[358] Consequently, tribal law enforcement is hobbled in its efforts to protect Indian citizens from reservation violence.

Regardless whether these sexual predators choose to visit or reside in Indian Country, they should be subjected to tribal jurisdiction if they prey on Indian citizens.[359] Just as residents of one state can be held to account for breaking the laws of another state they voluntarily enter, someone who enters an Indian reservation should be held to account for the violence he commits there. Even in light of court concerns, Congress could permit tribes to prosecute all crimes occurring on reservations and to sentence offenders to appropriate prison terms, while taking appropriate steps to ensure constitutional protections.[360] Despite its reluctance, this is something Congress must do. For too long, tribes have been stripped of their inherent sovereign responsibility to protect their citizens.[361] And clearly, tribal sovereignty is infringed by rules that prohibit tribal jurisdiction over crimes committed on tribal territory.[362] But even

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358. *Id.* at 3–4, 23; *see* Roberts, *supra* note 31, at 548–49.

359. At a minimum, tribes must be given full concurrent jurisdiction over the major crimes listed in the MCA regardless of the status of the offender as an Indian or non-Indian. As the Ninth Circuit explained in finding tribes retained concurrent jurisdiction over Indians under the MCA, tribal prosecution was necessary because federal prosecution to that point had been "virtually nonexistent." Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995). While that case dealt with larceny, the reality today is that federal prosecution of sexual assaults on Indian reservations are likewise virtually nonexistent. *Id.* (citing & quoting CANBY, *supra* note 107, at 135). Continuing to bar tribal jurisdiction means that these crimes will continue to go unpunished. *See id.* at 825–26 (citing NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, *supra* note 110, at 33–35).

360. *See* Eid, *supra* note 20, at 46 (tribal jurisdiction "holds enormous promise for making Indian country safer for all, provided there is no compromise on protecting the rights of the accused in federal criminal proceedings"); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), *superseded in part by statute*, 25 U.S.C. § 1301(2) (2006), *as stated in* United States v. Lara, 541 U.S. 193 (2004) (noting that tribal jurisdiction could not lie absent express grant of jurisdiction by Congress).

361. *See* Enion, *supra* note 311, at 523–24, 536; *cf.* Anita Fröhlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 SUFFOLK TRANSNAT'L L. REV. 271, 285 (2007) (citing Ekkehart Müller-Rappart, *International Cooperation in Prosecution and Punishment*, *in* POST-CONFLICT JUSTICE 913, 913 (M.C. Bassiouni ed., 2002)). "[T]he power to investigate and prosecute crimes occurring within the state's territory is considered a core element of state sovereignty." *Id.*

362. As Frederick A. Mann explained,

> Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty. As Lord Macmillan said, "it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal,

more than restoring tribal sovereignty, local control of law enforcement makes practical sense and is more likely to repair the broken tribal law enforcement system by placing responsibility for policing Indian communities in the hands of those most accountable to their communities.

## V. CONCLUSION

For more than a century, federal officials have held jurisdiction over major crimes in Indian Country. Today, reservations are facing a crisis. Indian Country has become a lawless place, where perpetrators of some of the worst offenses routinely escape any prosecution for their crimes. Consequently, Indian women experience sexual assault at rates more than double that of other American women. This crisis is likely to continue as long as tribes must depend on remote federal officials to police their communities.[363] Nevertheless, the TLOA persists in vesting the responsibility of policing reservations in those who are far removed from the communities that are affected while simultaneously refusing to permit tribes to more effectively address reservation crime. It is long past time to untie the jurisdictional knots that bind law enforcement hands, that let perpetrators escape punishment, and that leave Indian women without justice.

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> arising within these limits." If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty. . . . Such a system seems to establish a satisfactory regime for the whole world. It divides the world into compartments within each of which a sovereign State has jurisdiction. Moreover, the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction.

Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, *in* 111 RECUEIL DES COURS 1, 30 (1964-I) (internal citations omitted).

363. *See* Eid, *supra* note 20, at 40, 42; Pacheco, *supra* note 18, at 4; *Rape Cases Go Uninvestigated*, *supra* note 1. Standing Rock's tribal leader, Ron His Horse Is Thunder, believes sexual predators will be able to continue to prey on Indian women as long as the Tribe depends on federal law enforcement to police the Reservation. *See Rape Cases Go Uninvestigated*, *supra* note 1.