Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women
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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An Indian woman is two-and-a-half times more likely than any other American woman to be sexually assaulted in her lifetime. Nevertheless, because of a confusing tangle of jurisdictional rules, she is four times less likely to see her assailant arrested. She is even less likely to see him stand trial. Because jurisdiction over most sexual assaults is vested in the federal government, Indian tribes are not allowed to arrest or prosecute most of the suspects who commit sexual assaults on tribal lands. Consequently, tribal lands have become safe havens for sexual predators, who can commit their offenses with impunity and with little fear of prosecution.

This article proposes that federal jurisdiction prevents effective law enforcement on Indian reservations and leaves Indian women at a greater risk of sexual assault. While the recently passed Tribal Law and Order Act seeks to improve reservation law enforcement, it fails to provide meaningful reform because it perpetuates the current law enforcement scheme that leaves Indian women vulnerable to sexual assault. Remote federal officials are not in the best position—geographically, politically, or culturally—to police reservation lands. Instead, Congress needs to reassess tribal jurisdiction, permitting tribes to arrest and prosecute suspects who commit sexual assaults on tribal lands. 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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INTRODUCTION

In February 2003, twenty-year-old Leslie Ironwood lapsed into a coma and died after being held captive in a bathroom, beaten, and repeatedly raped by a group of men on the Standing Rock Sioux Reservation in South Dakota. Desperate to stop the assault, Ironwood had taken diabetes pills she found in the bathroom’s medicine cabinet, hoping that the men would stop their assault if she became unconscious. Later, from her hospital bed, Ironwood described her attack to a police officer. She named her assailants. Black and blue with bruises, she handwrote her statement. After her death, her rape was never investigated. Her assailants were never questioned. No one was prosecuted.

After Ironwood’s death, the Bureau of Indian Affairs police chief responsible for investigating crimes at Standing Rock, explained the lack of investigation on an inability to substantiate the rape. Although Ironwood 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. Nonetheless, four years later, reporters from National Public Radio were able to piece together the story of what happened to Ironwood that February night by examining Ironwood’s hospital records and by interviewing hospital employees, police, medical examiners, and other people familiar with her case. In one of those interviews, Doug Wilkinson, the BIA officer who took Ironwood’s statement, explained why many sexual assault cases occurring on the reservation were not

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1 All Things Considered: Rape Cases on Indian Lands Go Uninvestigated (NPR radio broadcast July 25, 2007) (transcript available at 2007 WLNR 14286120) [hereinafter Rape Cases Go Uninvestigated].
2 Id.
3 Id.
4 Id.
5 Id.
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.
investigated.\textsuperscript{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.\textsuperscript{14} Instead, forced to triage cases, only those cases where a suspect confessed were referred to the U.S. Attorneys Office for prosecution.\textsuperscript{15} Other cases were forgotten—at least by law enforcement, if not by the victims or their communities.\textsuperscript{16}

Ironwood’s story exemplifies all that is wrong with law enforcement in Indian Country.\textsuperscript{17} Despite epidemic levels of sexual assaults against native women,\textsuperscript{18} tribal governments are powerless to prosecute offenders.\textsuperscript{19} The primary obstacle to enforcement is a confusing knot of jurisdictional


\textsuperscript{14} \textit{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. \textit{Id.}

\textsuperscript{15} \textit{Id.}; see also Maze of Injustice, supra note 13.

\textsuperscript{16} \textit{Rape Cases Go Uninvestigated}, supra note 1; see also Maze of Injustice, supra note 13; \textit{Bill Moyers Journal}, supra note 13; Riley, \textit{Justice Broken}, supra note 13.

\textsuperscript{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.

\textsuperscript{18} U.S.C. § 1151.


rules that impede available law enforcement resources and that divest tribes of the authority to adequately prosecute those who victimize tribal citizens.\textsuperscript{20} Under federal law, tribal governments lack jurisdiction over most major crimes, including rape, that occur on reservation land.\textsuperscript{21} Tribes have no jurisdiction over any crimes committed by non-Indians even though more than eighty percent of sexual assaults on tribal lands are committed by non-Indians.\textsuperscript{22} As a result, tribal law enforcement officials must refer victims to the Federal Bureau of Investigation and the U.S. Attorneys Office, where prosecution of sexual offenders who commit crimes in Indian country is nearly nonexistent.\textsuperscript{23}

Consequently, tribal lands have become safe havens for sexual predators, who can commit their offenses without any fear of prosecution.\textsuperscript{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.”\textsuperscript{25} Indeed, “[t]o a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity.”\textsuperscript{26}

\begin{footnotes}
\item[21] 18 U.S.C. § 1153; Eid, supra note 20, at 43.
\item[22] Amnesty Int’l, \textit{Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA, Focus Sheet—The Role of Sovereign Tribal Authority} 1 (Apr. 2007), available at www.amnestyinternational.org [hereinafter \textit{Sovereign Tribal Authority}]; see also Pacheco, supra note 18, at 2; Ralph Blumenthal, \textit{For Indian Victims of Sexual Assault, a Tangled Legal Path}, \textit{N.Y. TIMES}, Apr. 25, 2007.
\item[23] \textit{All Things Considered: Legal Hurdles Stall Rape Cases on Native Lands} (NPR radio broadcast July 26, 2007) (transcript available at 2007 WLNR\_\_\_\_\_\_\_\_\_) [hereinafter \textit{Legal Hurdles}].
\item[25] \textit{1 Year Update}, supra note 20, at 9.
\item[26] \textit{Sovereign Tribal Authority}, supra note 22, at 2 (quoting Dr. David Lisak, Associate Professor of Psychology, University of Massachusetts, Sept. 29, 2003); see also 124 Stat. 2258; 155 Cong. 4315, 4333 (2009) (statement of Sen. John Barrasso).
\end{footnotes}
Thus far, Congress has responded with the Tribal Law and Order Act (TLOA), a half-measure that would do little to address the underlying impediment to effective tribal law enforcement by leaving the prevailing jurisdictional confusion in place. In this article, 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.\textsuperscript{27} Part I discusses the legal barriers that leave reservations and Indian women open to sexual predators who have little fear of prosecution.\textsuperscript{28} Part II discusses the TLOA’s provisions to improve tribal law enforcement.\textsuperscript{29} Part III concludes that the TLOA does not go far enough to protect Indian women victimized by sexual assault. It proposes instead that tribes need local control over law enforcement to effectively safeguard their citizens.\textsuperscript{30} 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.

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

Tragically, what happened to Leslie Ironwood is not unusual in Indian Country, where the criminal justice system is severely broken and crime has created a public safety crisis.\textsuperscript{31} Criminal investigations are delayed if they are pursued at all and serious felonies routinely escape prosecution altogether.\textsuperscript{32} As a consequence, Indian reservations have become prosecution-free zones where sexual predators can repeatedly victimize Indian women with impunity.\textsuperscript{33}

\textsuperscript{27} See infra __
\textsuperscript{28} See infra __
\textsuperscript{29} See infra __
\textsuperscript{30} See infra __
\textsuperscript{32} Riley, Justice Broken, supra note 13; Maze of Injustice, supra note 13.
\textsuperscript{33} Riley, Justice Broken, supra note 13; see also 124 Stat. 2258; 155 Cong. 4315, 4333 (2009) (statement of Sen. John Barrasso) (“Criminal elements are well aware
A. An Epidemic of Crime in Indian Country

Depending on the reservation, violent crime rates range from two to twenty times the national average.\textsuperscript{34} Indeed, while crime outside Indian reservations has generally declined in recent years, reservations have seen violent crime spiral upwards over the same time period.\textsuperscript{35} For sexual assaults, the number of reported cases is staggering.\textsuperscript{36} By U.S. Department of Justice estimates, one in three native women will be raped in her lifetime, nearly twice the national average.\textsuperscript{37} 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.\textsuperscript{38}


\textsuperscript{35} Bureau of Justice Statistics, 2006 Crime in the United States, Table 1, available at http://www.fbi.gov/ucr/cius2006/data/table_01.html (last visited June 25, 2009). For instance, between 2002 and 2006, homicides increased fourteen 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. On the Standing Rock Reservation where Leslie Ironwood lived, the crime rate is eight times the national average. Gipp, supra 34.

\textsuperscript{36} See Pacheco, supra note 18, at 2; Eid, supra note 20, at 40; Roberts, supra note 34, at 548; Matthew Handler, Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed To Fix It, 75 BROOK. L. REV. 261, 262 (2009).

\textsuperscript{37} Blumenthal, supra note 22; § 202 (a)(5)(B), 124 Stat. at 2262; 124 Stat. 2258; 155 Cong. 4315, 4334 (2009) (statement of Sen. Byron Dorgan); Pacheco, supra note 18, at 3; Eid, supra note 20, at 42. Generally, one in five women in the United States will be raped in her lifetime. Virginia Davis & Kevin Washburn, Sex Offender Registration in Indian Country, 6 OHIO ST. J. CRIM. L. 3, 3 (2008); see also Pacheco, supra note 18, at 3. Rates of sexual assault on Alaska Native women are even more staggering. Amnesty International reports that Alaska Native women are ten times more likely to be sexually assaulted than non-Native women. Blumenthal, supra note 22.

Tribal officials point out that the lack of prosecutions often permits an escalation of criminal activity that results in increasingly violent behavior.\(^\text{39}\) It also leaves Indian women open to victimization by sexual predators, the vast majority of whom are non-Indians who enter reservation lands to commit their crimes.\(^\text{40}\) According to the Justice Department, eighty-six percent of sexual assaults against Indian women are perpetrated by non-Indian men.\(^\text{41}\) 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.\(^\text{42}\)

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.\(^\text{43}\) Nevertheless, that women do not report being assaulted should be

\[\text{www.amnestyinternational.org [hereinafter Executive Summary].} \]

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 Native women raped and murdered. \(\text{All Things Considered: Rapes, Abuse High for Indigenous U.S. Women} \) (NPR radio broadcast April 24, 207) (transcript available at 2007 WLNR 7767662) [hereinafter \(\text{Rapes High for Indigenous Women}\)]. In many cases, the victims were tortured and beaten to death in addition to being raped. \(\text{Id.}\) Moreover, in many cases, these murders were not reported even by those who saw the victims’ bodies. \(\text{Id.}\) Even though Alaska Native women account for less than ten percent of Anchorage’s population, they account for more than half of all women sexually assaulted each year in Anchorage. \(\text{Id.}\)

\(\text{Id.}\) For instance, a tribal prosecutor sought the help of federal prosecutors to stop a serial rapist preying on women on the Fort Berthold reservation. \(\text{Id.}\) 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. \(\text{Id.}\) Without jurisdiction, tribal prosecutors could do nothing to investigate the pattern. \(\text{Id.}\) Federal prosecutors never responded. \(\text{Id.}\) 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. \(\text{Id.}\) She spent the night outside in frigid temperatures before she was able to reach safety. \(\text{Id.}\)

\(\text{See Pacheco, supra note 18, at 4 (“Tribes were once able and willing to deal with perpetrators of violence against women, and, as will be argued, the tribes' ability to enforce their laws bred a culture where women were safe.”).}\)

\(\text{Sovereign Tribal Authority, supra note 22, at 1; see Blumenthal, supra note 22.}\)

\(\text{Blumenthal, supra note 22.}\)

According to a recent Amnesty International study, Native women are sexually assaulted at rates higher than indicated by federal statistics. \(\text{Executive Summary, supra note 38.}\) Amnesty International researched sexual violence in Indian Country
regarded as another failure of law enforcement. 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.” They are told by relatives and friends that no one will prosecute the rape of an Indian woman. This belief is hard to shake given that the majority of reported assaults are ignored, with little or no investigation or prosecution.

Often, women who do report being raped are turned away or not believed. One woman reported being raped by three men who held her captive for three days. Police dismissed her report, labeling the rape “consensual sex” and explaining that she would not be believed with three witnesses against her. As the victim stated, “I had cigarette burns on me, and they called it consensual.” Even when a report is taken seriously, long delays in investigations can leave reservation residents demoralized. All too often, victims receive no information about what, if any, progress is being made on pursuing their attackers. These delays, which allow perpetrators to prey on more victims, can increase the likelihood of reprisals against victims and witnesses. Consequently, in those cases when prosecutions are finally pursued years later, victims often decline to press charges. Furthermore, long delays by federal agents can thwart the

in 2005 and 2006 in consultation with American Indians and Alaska Natives. In conducting this research, Amnesty focused on Oklahoma, the Standing Rock Sioux Reservation, and Alaska, interviewing victims of sexual assault, tribal law enforcement officials, healthcare and support workers. Amnesty also interviewed federal and state law enforcement officials. Maze of Injustice, supra note 13 (noting that indigenous women are often deterred from reporting sexual assault).

Sovereign Tribal Authority, supra note 22, at 1; Blumenthal, supra note 22.

Legal Hurdles, supra note 23. Indian woman recounted being raped by four white men when she was fourteen years old. 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. Executive Summary, supra note 38, at 1.

Blumenthal, supra note 22.

Id.

Id.

Id.

Riley, Justice Broken, supra note 13.

Maze of Injustice, supra note 13.

Id.

Id.

Riley, Justice Broken, supra note 13.
ability of tribal prosecutors to pursue even weak misdemeanor charges as investigations drag past the relevant statute of limitations.56

High rates of crime and feeble attempts at prosecution combine to create a lawlessness on reservations that undermines tribal communities and that leaves Indian women at risk. Their crimes 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.57 Crime victims feel trapped in their homes, fearful of repeated attacks.58 Other families opt to leave the reservations where they can no longer feel safe.59

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.60 These rules are a consequence of treaties, federal statutes, regulations, executive orders, and case law that have combined to create confusing overlaps of authority in some instances and jurisdictional gaps in others.61 Proving that more law does not necessarily make more justice, overly complex jurisdictional rules have resulted in a law enforcement disaster for the people living in Indian Country by stripping 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

56 Id.
57 Bill Moyers Journal, supra note 13.
58 Riley, Justice Broken, supra note 13.
59 See id.
60 “Criminal jurisdiction over offenses committed in ‘Indian country.’ 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); see Executive Summary, supra note 38; Johnson, supra 34; Shelley Bluejay Pierce, Tribes Helped With Preventing Violent Crimes Against Women, NATIVETIMES.COM, Mar. 31, 2009 (copy on file with author); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 730 (2005 ed.). 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.
61 Davis & Washburn, supra note 37, at 4; Eid, supra note 20, at 43-44; Pacheco, supra note 18, at 4.
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 Supreme 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.63

Continuing this trend more than fifty years later, the Court held that tribes had exclusive criminal jurisdiction over tribal members for offenses committed on tribal lands. That case, Ex Parte Crow Dog, involved the murder of Spotted Tail, a Brule Sioux Indian, by another Sioux, Crow Dog.64 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.65 Dissatisfied with the tribe’s punishment, the Bureau of Indian Affairs pursued federal prosecution.66 After a trial in the District Court of the Dakota Territory, Crow Dog was found guilty and sentenced to death.67 Crow Dog filed a habeas petition, challenging his conviction on the ground that territorial courts lacked jurisdiction over a crime committed in Indian territory by one Indian against another.68 According to Crow Dog, neither federal nor territorial law applied to him.69 Rather, he was subject only to the jurisdiction of his tribe.70 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.71

In granting Crow Dog’s petition, the Supreme Court held that the federal government lacked jurisdiction to prosecute Crow Dog.72 Agreeing with Crow Dog, the Court held that jurisdiction resided with the Sioux and that Crow Dog was subject only to tribal law.73 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.” 74 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.” 75 To ensure order and peace, the tribe needed proper jurisdiction to punish the murder of one tribal member by another. 76

In holding that the tribe had exclusive jurisdiction, the Court found its opinion reinforced by the distinct “nature and circumstances of the case.” 77 Of particular importance to the Court was the limited jurisdiction of the territorial court and that the case concerned “life and death.” 78 Given the weighty matter, the Court was unsettled by the United States’s attempt to extend its laws “by argument and inference only.” 79 In particular, the Court expressed concern with subjecting Indians to laws in which they had no role in drafting and that grew out of a different culture and context than their own. 80 According to the Court, permitting federal jurisdiction would permit the extension of federal criminal law

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, . . . . 81

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74 Id. at 568.
75 Id.
76 Id. at 557 & 572.
77 Id. at 571.
78 Id.
79 Id.
80 Id.
81 Id.
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.”82 Viewing tribes as “semi-independent nations,” 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.”83 The Court was reluctant to reverse this “uniform” policy without an express act of Congress.84 Because Congress had not expressly done so, the tribe retained exclusive jurisdiction to punish an offender.85 Nevertheless, the Court recognized that Congress possessed the authority to confer jurisdiction on federal courts.86

Congress responded to Crow Dog by passing the Major Crimes Act (MCA) in 1865.87 The MCA granted federal jurisdiction over certain major crimes committed by Indians in Indian Country.88 The enumerated crimes include major felonies such as murder, kidnapping, rape, and sexual assault.89 Just three years after Crow Dog, the Supreme Court upheld Congress’s authority to regulate crime occurring within tribal lands under the MCA.90

82 Id. at 572.
83 Id..
84 Id.
85 Id.
86 Id. at 56
87 18 U.S.C. § 1153; see Keeble v. United States, 412 U.S. 205, 209-12 (1973) (noting that Major Crimes Act was Congress’s response to Ex Parte Crow Dog); see also Pacheco, supra note 18, at 25-26; COHEN’S HANDBOOK, supra note 48, at 759 (citing WILLIAM A. BROPHY & SOPHIE D. ABERLE, THE INDIAN: AMERICA’S UNFINISHED BUSINESS 48-49 (1966)).
89 Specifically, the Major Crimes Act 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 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[.]

90 United States v. Kagama, 118 U.S. 375 (1886); Roberts, supra note 34, at 539. In United States v. Kagama, the Court held that the MCA was a valid exercise of
Although the MCA applies only to Indian defendants, under the Indian Country Crimes Act (ICCA) of 1854, 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. The 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. When both perpetrator and victim are non-Indian, state jurisdiction applies. Nor does the ICCA apply to offenses Congress’s “plenary power” over Indian tribes. Kagama, 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’s authority to regulate Indian country came from the United States’ “ownership of the country in which the territories [were] and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.” Id. at 379-80. Furthermore, Indian tribes were “within the geographical limits of the United States.” Id. at 379. And, those within those limits, “[w]e[re] under the political control of the Government of the United States, or of the States of the Union. There exists 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 “[t]hat has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.” Id. at 385. 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; L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 COLUM. L. REV. 809, 827-28 (1996).

91 Also known as the General Crimes Act. COHEN’S HANDBOOK, supra note 48, at 731.


93 COHEN’S HANDBOOK, supra note 48, at 734.

94 United States v. McBratney, 104 U.S. 621, 624 (1881); COHEN’S HANDBOOK, supra note 48, at 738, 754-56; Roberts, supra note 34, at 539. In McBratney, the Supreme Court held that although the 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. McBratney, 104 U.S. at 624 (finding state of Colorado had jurisdiction over prosecution of murder of non-Indian by non-Indian on Ute reservation); Roberts, supra note 34, at 539. For a brief discussion of the Court’s questionable statutory interpretation in McBratney, see COHEN’S HANDBOOK, supra note 48, at 506 & n.59. According to the Court,
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.  

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

It is less settled whether tribes have concurrent jurisdiction over Indian offenders for those offenses that are enumerated in the Major Crimes Act. The Supreme Court has indicated in dicta that the MCA makes federal jurisdiction exclusive of tribal and state jurisdiction.

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96 See United States v. Wheeler, 435 U.S. 313, 328-29 (1978) (holding that tribes’ retained sovereignty permits them to prosecute Indian offenders); Duro v. Reina, 495 U.S. 676, 694 (1990); see also COHEN’S HANDBOOK, supra note 48, at 756.
97 See COHEN’S HANDBOOK, supra note 48, at 756.
98 See id. at 758.
101 See COHEN’S HANDBOOK, supra note 48, at 759; see also Oliphant, 435 U.S. 191 (citing Felicia v. United States, 495F.2 353, 354 (8th Cir. 1974), and Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967)).
recently, however, the Ninth Circuit directly addressed the question and reached the opposite conclusion. 102 In that case, Georgia Leigh Wetsit, a member of the Fort Peck Tribe, sought habeas relief after being convicted in tribal court for manslaughter. 103 Because she had been tried and acquitted in federal court, Wetsit challenged her tribal conviction on the ground that the MCA divested her tribe of jurisdiction over the killing of her common-law husband, who was also a member of the tribe. 104

Relying on United States v. Wheeler, the circuit court held that the tribe retained concurrent jurisdiction under the MCA. 105 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.’” 106 Rather, in acting on that power, the tribe was “acting ‘as an independent sovereign.’” 107 The court was further persuaded by the tribes’ persistent practice of prosecuting theft, which is included in the MCA as “larceny.” 108 According to the court, tribal prosecution was necessary because federal prosecution of larceny was so “virtually nonexistent.” 109 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 preempted would preempt a large part of a tribe’s criminal jurisdiction.” 110 Noting that without tribal jurisdiction “many crimes on reservation would still go

102 Wetsit v. Stafne, 44 F.3d 823, 825-26 (9th Cir. 1995); see also COHEN’S HANDBOOK, supra note 48, at 759.
104 Wetsit, 44 F.3d at 824.
105 Id. at 825; see also Roberts, supra note 34, at 541.
106 Id. (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).
107 Id. (quoting Wheeler, 435 U.S. at 329).
108 Id. (citing CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 135 (2d ed. 1988)).
109 Id. (citing & quoting CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 135 (2d ed. 1988)).
110 Id. at 826 (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 339-41 (1982 ed.)).
unpunished,” the court concluded that retention of “jurisdiction by the tribes can only increase their responsibility for efficient and fair justice.”

Even assuming that tribal courts retain concurrent jurisdiction over Indian defendants, the reality is that few major crimes have been prosecuted in tribal courts. 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. 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. Given these restrictions, tribes largely opt to forego prosecution. Moreover, because

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111 Id. at 825-26 (citing D. Getches, ed., National American Indian Court Judges Association, Indian Courts in the Future 33-35 (1978)).
114 25 U.S.C. § 1302(7); Pub. L. No. 96-88, 81 Stat. 787 (1968), codified as amended at 25 U.S.C. § 1301-03. 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 48, 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 Keeble v. United States, 412 U.S. 205, 209-12 (1973) (noting that Major Crimes Act was Congress’s response to Ex Parte Crow Dog); Cohen’s Handbook, supra note 48, at 759 (citing William A. Brophy & Sophie D. Aberle, The Indian: America’s Unfinished Business 48-49 (1966)).
115 Canby, supra note 91, at 190 (“Even before the 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 Major Crimes Act to provide federal jurisdiction over assaults resulting in serious bodily injury. 18 U.S.C. § 1153; Keeble v. United States, 412 U.S. 205, 211 n.10 (1973) 211 n.10. The inclusion of this offense was deemed necessary because

[without 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]
tribal jails are often underfunded, sentences are usually much shorter simply because tribes lack jail bed space to hold offenders.\textsuperscript{116} 

Tribes have no jurisdiction to prosecute or punish non-Indian offenders even for crimes occurring against Indians on tribal lands.\textsuperscript{117} In \textit{Oliphant v. Suquamish Indian Tribe}, the Suquamish Indian Provisional Court attempted to prosecute two non-Indian residents of the reservation for misdemeanor offenses that occurred on reservation.\textsuperscript{118} The trial was halted when the two defendants, Mark Oliphant and Daniel Belgarde, sought habeas relief.\textsuperscript{119} In challenging their prosecutions, the defendants aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense. 

\textit{Keeble}, 412 U.S. at 211 n.10 (citing S.Rep.No.721, 90th Cong., 1st Sess., 32 (1967)). ICRA’s limit on tribal penalties has been criticized for implying that tribes are ill equipped to handle anything but misdemeanor offenses. \textit{Jurisdiction, supra} note 100.


\textsuperscript{117} Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Eid, \textit{supra} note 20, at 44; Roberts, \textit{supra} note 34, at 540. Tribes do retain the authority to exclude anyone, including non-Indians, from their reservations. Duro v. Reina, 494 U.S. 676, 696-97 (1990); see Worcester v. Georgia, 31 U.S. 515 (1832); COHEN’S \textit{HANDBOOK}, \textit{supra} note 48, at 769. This is true even if the tribe lacks criminal jurisdiction over the individual. \textit{Duro}, 494 U.S. at 696-97; see \textit{Worcester}, 31 U.S. 515. Except 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 \textit{HANDBOOK}, \textit{supra} note 48, at 220 (citing Nevada v. Hicks, 533 U.S. 353, 363-64 (2001)). Or where reservation roads are constructed with federal funds, those roads must be kept open to the public. \textit{Id.} at 220 n.144. This suggests that a tribe could then try a non-Indian for an offense so long as the only punishment is exile. \textit{Id.} at 769.

\textsuperscript{118} Oliphant, 435 U.S. at 194; Samuel E. Ennis, \textit{Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant}, 57 UCLA L. Rev. 553, 555 (2009); Roberts, \textit{supra} note 34, at 540. One defendant had been charged with assaulting a tribal officer and resisting arrest. \textit{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. \textit{Id.}

\textsuperscript{119} \textit{Id.}
argued that the tribal court lacked jurisdiction to prosecute non-Indians. For its part, the tribe contended that its jurisdiction over non-Indians stemmed from its “retained inherent powers of government over the Port Madison Indian Reservation.”

The district court rejected Oliphant’s petition, relying on the Supreme Court’s recognition of Indian tribes as “quasi-sovereign entities.” The Ninth Circuit affirmed 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.” Thus, tribal jurisdiction over persons committing crimes on the reservation were the “‘sine qua non’ of such powers.”

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. For the Court, this assumption formed the basis for its conclusion that tribal jurisdiction over non-Indians would be “inconsistent with their status” as dependant nations. 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.” 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.” Reading the Treaty with the 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.

120 Id.
121 Id. at195-96.
123 Id.
124 Id.
125 Id. at 196-205. The Court’s assumption is belied by the fact that in the years leading up to Oliphant, approximately one third of Indian tribes were exercising jurisdiction over non-members and non-Indians. See Bethany R. Berger, Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047, 1055 (2005); Roberts, supra note 34, at 541 (“At the time [Oliphant] was decided, 33 of the 127 recognized tribes nationwide who exercised criminal jurisdiction extended that jurisdiction to cover non-Indians”).
126 Oliphant, 435 U.S. at 208.
127 Id. at 207.
128 Id.
129 Id. at 208.
While the 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 not lie absent an express grant of congressional authority. Although tribes retained quasi-sovereign status, those retained powers are not sufficient to permit jurisdiction. 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.’” 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. 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.” As a consequence of their incorporation into the United States, tribes suffered an “inherent” limitation on their sovereignty. 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.” 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.

Also important to the Court was Congress’s desire to protect U.S. citizens from “unwanted intrusions on their personal liberty.” 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

130 Id.
131 Id.
132 Id. (emphasis in original).
133 Id. at 209.
134 Id.
135 Id.
136 Id. at 211.
137 Id. at 195-96. 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. Id. at 196.
138 Id. at 210.
acceptable to Congress.\textsuperscript{139} 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.\textsuperscript{140} The Court also feared that the full compliment of “basic criminal rights that would attach in non-Indian related cases” would not be available in a tribal court.\textsuperscript{141} Thus, denying tribes the authority to try and punish non-Indians would ensure against such intrusions.\textsuperscript{142} 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.\textsuperscript{143}

After Oliphant, the Court held that tribes also lacked jurisdiction over non-member Indians—that is, over those Indians who were not also members of the particular tribe asserting jurisdiction.\textsuperscript{144} Following its reasoning in Oliphant, the Court held in Duro v. Reina that tribal jurisdiction over a non-member constituted an “external” power that was likewise “inconsistent with the Tribe’s dependant status.”\textsuperscript{145} Rather, the tribe could exert such authority only through an express congressional grant and subject to constitutional safeguards.\textsuperscript{146} That authorization came, however, when Congress amended the Indian Civil Rights Act to permit tribal jurisdiction over all Indians as part of “the inherent power[s] of an Indian tribe.”\textsuperscript{147} Under this “Duro Fix” non-member Indians could be prosecuted by any tribe for offenses committed on tribal lands.\textsuperscript{148} However,

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 211.
\textsuperscript{141} Id.
\textsuperscript{142} 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).
\textsuperscript{143} Oliphant, 435 U.S. at 210.
\textsuperscript{144} Duro v. Reina, 494 U.S. 676, 696-97 (1990); Benjamin J. Cordiano, Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after Duro v. Reina, 41 CONN. L. REV. 265, 266 (2008); Roberts, supra note 34, at 549.
\textsuperscript{145} Duro, 494 U.S. at 684-86; Cordiano, supra note 135, at 266; Roberts, supra note 34, at 549.
\textsuperscript{146} Duro, 494 U.S. at 684-86; Cordiano, supra note 135, at 266; Roberts, supra note 34, at 549.
\textsuperscript{147} 25 U.S.C. § 1301(2); Cordiano, supra note 135, at 266; Roberts, supra note 34, at 549.
\textsuperscript{148} 25 U.S.C. § 1301(2); Cordiano, supra note 135, at 266; Roberts, supra note 34, at 544-44.
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. In United States v. Lara, the petitioner contended that his federal prosecution violated the double jeopardy clause because he had already been subjected to tribal prosecution. 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. In so holding, the Court rejected the argument that the tribe’s

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150 Lara, 541 U.S. at 200; 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); Roberts, supra note 34, at 530. 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 200. 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 non-member Indians to be treated differently than non-member non-Indians. Id. 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.), certiorari denied 549 U.S. 952 (2005) (holding that nonmember Indian was subject to tribal jurisdiction). In that case, the Ninth Circuit reasoned that by criminal jurisdiction in the tribes over “all Indians,” the Indian Civil Rights Act applied to all persons of Indian ancestry who were also Indians by political affiliation. Id. Thus, because jurisdiction depended on a political rather than a racial classification, it did not violate Means’s right to equal protection. Id.

151 Lara, 541 U.S. at 200; Wolpin, supra note 141, at 1077; Roberts, supra note 34, at 531-32. The Court had reached a similar conclusion in United States v. Wheeler, holding 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). Thus, double jeopardy did not prohibit the prosecution of a
prosecution had been an exercise of delegated federal authority.\textsuperscript{152} Rather, the Court recognized that a tribe’s authority to prosecute came from the tribe’s inherent tribal authority.\textsuperscript{153} Accordingly, under the dual sovereignty doctrine, a subsequent federal prosecution did not violate double jeopardy.\textsuperscript{154}

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;\textsuperscript{155} and (3) whether the offense took place on tribal lands.\textsuperscript{156} 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.\textsuperscript{157} When an offense is not listed in the MCA, federal jurisdiction may still lie under the ICCA when either—but not both—the victim or the accused is an Indian and the offense is a federal crime committed in Indian Country.\textsuperscript{158} However, the ICCA does not apply if the tribe has already

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\item[152] Lara, 541 U.S. at 200.
\item[153] Id.; see Roberts, supra note 34, at 531.
\item[154] Lara, 541 U.S. at 200; Roberts, supra note 34, at 532. Double jeopardy is also implicated when the successive prosecution is by a tribal court after a federal prosecution. COHEN’S HANDBOOK, supra note 48, at 762. In such a case, the tribal court would not be bound by the Bill of Rights, but by the Indian Civil Rights Act’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. Id.
\item[155] Of course, one problem with this jurisdictional division is defining precisely who is an “Indian.” 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.
\item[157] 18 U.S.C. § 1153; COHEN’S HANDBOOK, supra note 48, at 743. “Indian” is defined as 25 U.S.C. § 1301 (citing to 18 U.S.C. § 1153). Of course, the determination of “Indian” is open to challenge as well. 9.02[1][d][i].
\item[158] Donnelly v. United States, 228 U.S. 243 (1913); COHEN’S HANDBOOK, supra note 48, at 509. Some state and federal courts have applied McBratney to find that state jurisdiction lies over “victimless” crimes committed in Indian Country by non-Indians. COHEN’S HANDBOOK, supra note 48, at 755. However, even if a crime
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imposed punishment against an Indian offender.\textsuperscript{159} If neither the victim nor the accused is Indian and the crime is not a federal offense, state jurisdiction applies.\textsuperscript{160} 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.\textsuperscript{161} Finally, tribal jurisdiction may or may not be concurrent depending on the crime charged.\textsuperscript{162} Given this complexity, it is unsurprising that law enforcement in Indian Country is as confusing and ineffective as it is.\textsuperscript{163}

II.

PULLING AT THE THREADS: THE TRIBAL LAW & ORDER ACT OF 2010

Describing law enforcement in Indian Country as “a proven failure,”\textsuperscript{164} Senator Byron Dorgan\textsuperscript{165} introduced the Tribal Law and Order Act (TLOA) in 2009 “to strengthen law enforcement and justice in Indian communities.”\textsuperscript{166} Passed by Congress and signed into law in 2010, the

lacks an identifiable victim, federal jurisdiction is proper if the conduct impacts Indians or their interests. \textit{Id.} (citing e.g., U.S. Dept. of Justice, \textit{Memorandum from Office of Legal Counsel: Jurisdiction Over “Victimless” Crimes Committed by Non-Indians}, 6 \textit{INDIAN L. REP.} K-15 (1979)).

\textsuperscript{159} 18 U.S.C. § 1152; COHEN’S HANDBOOK, \textit{supra} note 48, at 738, 741.

\textsuperscript{160} COHEN’S HANDBOOK, \textit{supra} note 48, at 509-10.

\textsuperscript{161} \textit{See Wheeler}, 435 U.S. at 328-29 (holding that tribes’ retained sovereignty permits them to prosecute Indian offenders); \textit{Duro v. Reina}, 495 U.S. 676, 694 (1990); \textit{see also} COHEN’S HANDBOOK, \textit{supra} note 48, at 756.

\textsuperscript{162} \textit{See} COHEN’S HANDBOOK, \textit{supra} note 48, at 756.

\textsuperscript{163} \textit{See} Eid, \textit{supra} note 20, at 43-46.


\textsuperscript{165} Senator Dorgan is the Chair of the Senate Committee on Indian Affairs. Byron Dorgan Press Release, Legislation Would Strengthen Law & Order in Indian Country (May 3, 2009), available at http://indian.senate.gov [hereinafter Dorgan Press May 2009 Release]. 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). \textit{Id.} At the same time, Representative Stephanie Herseth Sandlin introduced companion legislation in the House. H.R.1924 (April 2, 2009).

TLOA aims to address the failures that have permitted crime to flourish on Indian reservations. Specifically, the TLOA seeks to “boost law enforcement efforts by providing tools to tribal justice officials to fight crime in their own communities, improving coordination between law enforcement agencies, and increasing accountability standards.”

available at www.usdoj.gov. 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 Dep’t of Justice, Department of Justice Plan To Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175 (Jan. 27, 2010) (available at http://www.justice.gov/opa/documents/exec13175-consultation-policy.pdf) [hereinafter Dep’t of Justice Jan. 27, 2010 Press Release].

At the conclusion of the series of meetings, the Attorney General instructed those USAOs 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. Dep’t of Justice, Press Release, Attorney General Announces Significant Reforms to Improve Public Safety in Indian Country (Jan. 11, 2010), 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 Press Release, 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, Press Release, Attorney General Announces Significant Reforms to Improve Public Safety in Indian Country (Jan. 11, 2010), http://www.justice.gov/opa/pr/2010/January/10-ag-019.html; Dep’t of Justice Jan. 27, 2010 Press Release, supra. 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 note 191; Dep’t of Justice Jan. 27, 2010 Press Release, supra note 165. 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. 11, 2010 Press Release, supra.

167 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. Furthermore, the initial bill included more extensive congressional findings, some of which are omitted from the final act’s list of findings. Because these findings are nonetheless part of the act’s legislative history, they are discussed in this article.

To accomplish its goals, the TLOA requires enhanced coordination and cooperation between the Department of Justice, the Bureau of Indian Affairs, and tribal communities in the investigation and prosecution of Indian Country crimes. 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. It provides tribal law enforcement with access to national crime databases, thereby ensuring tribal police have access to vital criminal history information about suspects. It also expands the authority of tribal police to investigate crimes by non-Indians through deputization agreements with local or federal law enforcement agencies.

To further facilitate federal-tribal cooperation, the TLOA requires that every federal district that includes Indian Country appoint at least one U.S. Attorney to serve as a tribal liaison to coordinate prosecution of crimes occurring on Indian reservations. Tribal liaisons are also tasked with developing relationships with reservation residents and facilitating residents’ interactions with federal justice system. Specifically, the liaison is to develop and maintain communication between federal officials and tribal leaders, tribal justice officers, and victims’ advocates. Tribal liaisons will also provide technical assistance and training to tribal officers on evidence gathering and techniques for victim and witness protection.


170 § 251, 124 Stat. at 2297-2299.


172 124 Stat. 2258.

173 § 213 (b) 124 Stat. at 2268-2269.


176 See § 213, 124 Stat. at 2268-2269. They will also provide seminars to train tribal officers as special law enforcement commissions, under which tribal officers will act under the direct of federal law enforcement officers. Id.; see infra pp. ___.
limiting a U.S. Attorney from ultimately determining the liaison’s duties necessary to serve a particular Indian community. Further, to enhance the prosecution of minor crimes, U.S. Attorney 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. The TLOA encourages federal prosecutors to coordinate with federal courts to hold trials or other criminal proceedings in Indian Country. Ultimately, the creation of Special Assistant Attorneys is left to the discretion of the individual office.

The TLOA also expands and clarifies the authority of BIA officers to arrest suspected offenders for crimes committed on reservations. 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 “has reasonable grounds to believe that the person to be arrested has committed, or is committing, the felony.” In the case of misdemeanor involving domestic or dating violence, stalking or violation of a protection order, an arrest can be made if the offense has an element of the use of force or threatened use of a deadly weapon, and if the officer has reasonable grounds to believe the person arrested has, or is committing, the offense. For their part, tribal law enforcement may lack the authority to arrest non-Indians who commit crimes on reservation land. As one tribal

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177 See § 213(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.”).
180 See § 213(d)(1), 124 Stat. at 2269.
181 124 Stat. 2258; 155 Cong. 4315, 4334 (2009) (statement of Sen. Byron Dorgan). In PL 280 states, the authority to arrest depends on the jurisdiction. See Jurisdiction, supra note 100, 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.
184 See Bressi v. Ford, 575 F.3d 891, 895-96 (2009) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), 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. Id. at 896 (“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.
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. Instead, his only recourse was to retain the offender and refer the crime committed by the non-Indian to federal prosecutors, who rarely acted on the referrals.

Under the TLOA, BIA officers 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 “have reasonable grounds to believe the person to be arrested has committed, or is committing, the crime.” Further, the TLOA enhances the Special Law Enforcement Commission program, which permits deputization of tribal officers to enforce federal laws. 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. Further, the Secretary is required to draft—in consultation with tribal officials—criteria tribal officers must meet to qualify for inclusion in the Special Law Enforcement Commissions. 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.”

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. For instance, federal officials are required to notify tribal

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185 Legal Hurdles, supra note 23.
186 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, 1180 (9th Cir. 1975) (holding 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).
187 Legal Hurdles, supra note 23; Jurisdiction, supra note 100, at 4 n.10.
188 § 211 (c), 124 Stat. at 2266-2267.
189 § 231, 124 Stat. at 2272-2274.
190 § 231, 124 Stat. at 2272-2274.
191 § 231, 124 Stat. at 2272-2274.
192 § 206, 124 Stat. at 2264.
governments when a sex offender is released onto a reservation from federal custody. Additionally, federal health and law enforcement agencies must develop consistent sexual assault protocols and appear to testify in tribal court prosecutions of sexual assailants. 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. According to Senator Dorgan, these provisions are designed to improve both federal and tribal prosecutions of sexual assault.

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.” Further, FBI officials must compile annual reports detailing each investigation declined or terminated and provide annual reports to Congress. The disposition reports must detail the type of crime, whether the perpetrator or victim is Indian or non-Indian, and the reason the investigation was declined or terminated. 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. If the U.S. Attorney’s 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.” 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

194  § 261, 124 Stat. at 2299.
198  § 212 (a)(1), (b), 124 Stat. at 2267.
199  § 212 (a)(2), 124 Stat. at 2267.
200  § 212 (a)(2), 124 Stat. at 2267. 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 152.
prosecute the offense. The Issues Coordinator must then submit annual declination reports to Congress.

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

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 incarcerating offenders by improving courts, jails, youth programs, and policing efforts in Indian Country. Tribes are permitted to enter into agreements with the Bureau of Prisons to transfer offenders convicted in tribal courts to the federal facilities. Further, the Act 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. 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.

203 § 212 (a)(4) 124 Stat. at 2267-2268.
204 § 212 (a)(4), (b) 124 Stat. at 2267-2268.
210 § 244(a), 124 Stat at. 2294.
211 § 244(a), 124 Stat at. 2294.
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. Once the Attorney General consented to provide this support, the tribe’s request would essentially grant concurrent jurisdiction to the United States. Further, state and tribal governments are encouraged to “enter into cooperative law enforcement agreements to combat crime in Indian country and nearby communities.”

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.” It does not, however, go far enough in providing tribal governments with the legal tools necessary to protect their communities from sexual predators.

III. HOW THE TLOA LEAVES THE JURISDICTIONAL KNOTS INTACT 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.

212 § 221(b), 124 Stat. at 2272.
213 § 221(b), 124 Stat. at 2272.
214 § 222, 124 Stat. at 2272.
217 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 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 at 7, S. Rep. 102-168, S. Rep. No.
Off the record, federal law-enforcement officials admit that U.S. attorneys view prosecution of reservation crime as a waste of prosecution resources. Many simply find sexual assault cases insignificant compared to their usual cases involving terrorism, organized crime, drug offenses, and racketeering. According to former U.S. Attorney Margaret Chaira, 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. 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.

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. Nevertheless, the persistent perception that crime on Indian reservations is not a priority for the Justice Department seems to have taken hold. 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. This perception is borne out by Justice Department statistics showing that U.S. Attorneys Offices refuse more cases from the BIA than from any other federal agency. 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.


218 Riley, Principles, Politics, supra note 106.
219 See Maze of Injustice, supra note 13.
220 Riley, Justice Broken, supra note 13; Bill Moyers Journal, supra note 13.
221 Riley, Justice Broken, supra note 13.
222 Riley, Principles, Politics, supra note 106 (quoting current federal prosecutor who declined to be named).
223 Riley, Principles, Politics, supra note 106.
224 Jalonick, supra note 152; Riley, Principles, Politics, supra note 106.
225 Legal Hurdles, supra note 23.
226 Riley, Justice Broken, supra note 13.
Far from being an isolated problem, the low priority given to policing Indian country is reinforced by Justice Department policies. For instance, according to one federal attorney, prosecution of Indian country crime is not part of the criteria used to evaluate individual attorneys. Instead, it is the cases involving terrorism, organized crime, major-drug cases, and white-collar crimes that are used to measure performance. Thus, it is no wonder that some federal attorneys consider prosecution of crimes such as sexual assault on reservations as “career killers” and opt to pursue more professionally valuable cases. While the TLOA provides

227 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. Riley, Principles, Politics, supra note 106. The official seemed entirely unaware of the Justice Department’s role as the sole prosecutor of major crimes on Indian reservations. Id.

228 Riley, Principles, Politics, supra note 106 (quoting current federal prosecutor who declined to be named that “One criterion that has never been on the list is Indian Country cases.”).

229 Riley, Principles, Politics, supra note 106; see Joe Hanel, Justice Department to Help Tribes, DURANGO HERALD, Sept. 22, 2009 (explaining that 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).

230 Riley, Principles, Politics, supra note 106. 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.” Id. In a breathtakingly ironic twist, this attorney—fired for spending too much time on Indian issues—was the chair of the U.S. Attorney’s Native American Issues Subcommittee, “essentially the department’s point man on improving the effectiveness of reservation prosecutions.” Id. These attorneys’ terminations only confirmed the beliefs of tribal leaders that law enforcement on Indian reservations was a low priority for the Department, that Justice 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
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.\footnote{See \textsection 213(d)(2)(B)(ii), 124 Stat. at 2270.}

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 U.S. Attorneys and FBI offices are likely to be located.\footnote{See \textsection 213(d)(2)(B)(ii), 124 Stat. at 2270.} The remoteness and sheer size of most reservations can make investigation and prosecution difficult.\footnote{See \textsection 213(d)(2)(B)(ii), 124 Stat. at 2270.} First, the closest federal court may be hundreds of miles away from the Democratic administrations. Rather, reservation crime does not appear to have been a priority to any administration. \textit{Id.} Indeed, the rate at which federal prosecutors decline to prosecute cases from Indian Country has remained at seventy-six percent for more than a decade. \textit{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. \textit{Id.;} Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258; 155 Cong. 4315, 4333 (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.”).
crime scene. 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. Doing so can increase the costs of a trial by thousands of dollars, make witnesses less willing to cooperate, and further burden victims. 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. 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 and 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 obligations in Indian Country.” 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 from an FBI field office, the more likely the U.S. Attorneys Office would decline the case.

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, each with varying traditions,
This unfamiliarity 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 non-native cultures, it may simply be difficult for Anglo officers to infiltrate tribes for investigation or undercover work. 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.” 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?” 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. Tribal police from within the community are simply in a better position to conduct investigations, 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, 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 twenty percent. 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, twenty-six percent led to an arrest, but of those rapes reported from Indian Country in 2006, only 7% led to an arrest. 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. Consequently, the vast majority of sexual assaults occurring on Indian reservations go unpunished, victims are left without any law enforcement protection, and

246 Legal Hurdles, supra note 23.
247 According to the Justice Department, investigations of crime on Indian reservations declined by twenty-one percent between 1997 and 2000. Rape Cases Go Uninvestigated, supra note 1.
248 See FBI, Uniform Crime Reports, Crime in the United States, 2006 (2007), available at http://www.fbi.gov/ucr/cius2006/. In 2006, there were an estimated 92,455 forcible rapes reported to law enforcement nationwide. Id. Of those, there were 24,535 arrests. Id.
249 See Bill Moyers Journal, supra note 13. For aggravated assault, only four 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 152. Rather, the data was reported by Syracuse University, based on data from the Interior Department and the Transactional Records Access Clearinghouse, or TRAC, at Syracuse University. Id.; Riley, Justice Broken, supra note 13.
250 “[Sixty-five percent] of the complaints that are filed are just rejected out of hand by federal prosecutors. That's an astounding number.” Bill Moyers Journal, supra note 13; see also 124 Stat. 2258; 155 Cong. 4315, 4334 (2009) (statement of Sen. Byron Dorgan describing declinations between 2004 and 2007). In cases of child sexual offenses, federal prosecutors decline seventy two percent of cases. Id. For Native Alaskan women the rate of prosecution is even lower: in “approximately 90 percent of cases where women undergo forensic exams[,] there is no prosecution.” Executive Summary, supra note 38. Indeed, rates at which prosecutors decline to prosecute vary depending on district. See Riley, Justice Broken, supra note 13 (chart detailing varying rates of declinations in different districts).
reservations become safe havens for sexual predators to attack their victims with little fear of punishment.  

It is difficult to imagine that such dismal rates of arrest and prosecution would be tolerated in any other community in the United States. In those communities, however, citizens can demand more from their law enforcement officials, can appeal to their elected leaders for change, or can vote to change recalcitrant leaders. 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. 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 this information to Congress on an annual basis. Similarly, federal

251 See Bill Moyers Journal, supra note 13; Handler, supra note 36, at 263 (“As a result of this broken system of justice, the prevalence of violent crime within Indian communities is formidable.”).

252 “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.” Bill Moyers Journal, supra note 13; 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 (describing Los Angeles’s increase in 2007 arrest rate of 28% as reversal of “worrisome trend” from 2006 where rate was 26%).

253 Schmelzer, supra note 201 (“The reason that crime is a local issue in the United States is that then you can hold local people accountable.”).


prosecutors must compile information on all cases that they declined to prosecute.\textsuperscript{256} Cases declined for prosecution must be reported to the Native American Issues Coordinator, who is tasked with annually report declinations to Congress.\textsuperscript{257} 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.\textsuperscript{258}

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.\textsuperscript{259} Simply put, requiring annual reports be sent to a remote Congress is a poor proxy for direct responsibility to a voting constituency.

Nor is the TLOA’s creation of tribal liaisons likely to compensate for a distant law enforcement unaccountable to the local constituency. Under


\textsuperscript{258} See All Things Considered: Bill Bolsters Tribal Powers to Prosecute Rape Cases (NPR radio broadcast July 23, 2008), transcript available at 2007 WLNR 13775060 [hereinafter Bill Bolsters Tribal Power]; see Roberts, supra note 34, 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”).

\textsuperscript{259} See United States v. Wheeler, 435 U.S. 313, 331 (1978) (“[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.”); Roberts, supra note 34, 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.”); Brief Amici Curiae on Behalf of Eighteen American Indian Tribes at 16, United States v. Lara, 541 U.S. 193 (2004) (“Tribes have the incentive and are the logical jurisdictional authority to deal with misdemeanor crime.”); 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 at 7, S. Rep. 102-168, S. Rep. No. 168, 102nd Cong., 1st Sess. 1991 (Oct. 2, 1991) (“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.”); 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 (2000).
the TLOA, a primary duty of tribal liaisons is facilitating communication between tribal residents and federal law enforcement. 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. 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. However, before they can be certified, tribal officers would have to satisfy Interior Department criteria for certification. At this point, it is unclear what those criteria will be or how many tribal officers will meet them. 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.

The lower priority given to tribal law enforcement has resulted in woefully inadequate policing resources on each reservation. Despite its

260 See § 213(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.”).
262 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 2272-2274.
trust responsibility to provide Indian tribes with federal law 
enforcement,263 the United States provides dramatically fewer law 
enforcement resources to native communities that are available in 
comparable non-native rural communities.264 According to the BIA, in 
2006 “tribal police were staffed at 58 percent of need.”265 Consequently, 
fewer than three thousand federal and tribal law enforcement officers are 
responsible for policing fifty-six million acres of Indian Country.266 This 
“reflects less than half of the law enforcement presence in comparable 
rural communities.”267

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.268 During that time, evidentiary leads can run cold.

263 § 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 tribal communities”); 154 

264 Sovereign Tribal Authority, supra note 22, at 3. The BIA employs 334 officers 
in Indian Country. Brian A. Reaves & Lunn M. Bauer, Bureau of Justice Statistics 
are thirty-two federal officers for every thousand persons. Id. 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 Ironwood 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 
(on file with author), available at www.amnestyinternational.org [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 37; 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.

265 Gipp, supra 34. Adequate staffing would require hiring 1,854 additional police 
officers. Id.

Sandlin) (Sept. 18, 2008); Johnson, supra 34. For example, the staffing levels at 
Standing Rock are sixty-six percent below the number of officers in a comparable 
off-reservation rural area. Amnesty Int’l Letter, supra note 238.

(statement of Sen. Byron Dorgan).

268 Rape Cases Go Uninvestigated, supra note 1; see also 124 Stat. 2258; 155 
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 Flambeau reservation has nine full-time and four part-time officers to police 
three thousand residents living on 108 square miles. Richmond, supra note 35.
evidence itself can be lost, and victims can become discouraged and less likely to participate in the investigation.\textsuperscript{269} 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.\textsuperscript{270} As a result of this confusion, investigation leads can run cold or end up never being pursued.\textsuperscript{271} 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.\textsuperscript{272}

While the TLOA seeks to bolster tribal police investigation and arrest ability,\textsuperscript{273} the problems of remoteness in space and culture cannot be

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. \textit{Maze of Injustice}, supra note 13. For example, one Oklahoma tribe has a police force consisting of fourteen to fifteen officers. \textit{Id.} In contrast, other Oklahoma tribes have only two or three officers on their force. \textit{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. 154 Cong. Rec. E1542-01 (statement of Rep. Sandlin introducing the Tribal Law and Order Act of 2008, extension of remarks) (July 23, 2008). Although Cheyenne 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. \textit{Id.} Nevertheless, it is typical for tribal police to respond in hours rather than minutes to an emergency call. \textit{See} Gipp, \textit{supra} note 34.

\textsuperscript{269} \textit{See} Jurisdiction, \textit{supra} note 100, at 2.

\textsuperscript{270} Jurisdiction, \textit{supra} note 100, at 2; Pierce, \textit{supra} note 48.

\textsuperscript{271} Jurisdiction, \textit{supra} note 100, at 2.

\textsuperscript{272} See \textit{Executive Summary}, \textit{supra} note 38; Pierce, \textit{supra} note 48. The jurisdictional complexity can also discourage Indian women from wanting to report or make it difficult for them to know which authority to approach. \textit{Legal Hurdles}, \textit{supra} note 23; Pierce, \textit{supra} note 48. In one case reported by Amnesty International, two women were raped by three non-Indian men in 2005. \textit{Executive Summary}, \textit{supra} note 38. 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. \textit{Id.} This meant prosecution was unlikely because proper jurisdiction could not be established. \textit{Executive Summary}, \textit{supra} note 38; Pierce, \textit{supra} note 48.

\textsuperscript{273} \textit{See supra} p. …
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. 274 In those cases where federal investigators have ceded investigative responsibilities to the tribe, 275 the federal perception of tribal police incompetence can mean the absence of any actual prosecution. 276 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. 277 Because few tribal officers have such training, this means that virtually every child rape case investigated by tribal officers will not be prosecuted. 278 However, it is “rare” for the FBI to become involved in investigating sexual assaults against Indian women. 279 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. 280

274 See Riley, Justice Broken, supra note 13; Amnesty Int’l, Maze of Injustice: The Failure to Protect Indigenous Maze of Injustice, supra note 13.
275 For instance, in cases involving child victims over the age of nine.
276 See Riley, 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 more than thirty minutes from the reservation. See Riley, Justice Broken, supra note 13. Residents report that he and his staff will disappear from the reservation for months at a time. Id.
277 See Riley, Justice Broken, supra note 13.
278 See Riley, Justice Broken, supra note 13.
279 Executive Summary, supra note 38.
280 Executive Summary, supra note 38. Prosecutors contend that the use of alcohol by victims, suspects, and witnesses makes cases harder to prove. Riley, Justice Broken, supra note 13. Indeed, U.S. Attorneys routinely decline to prosecute cases where alcohol is involved. Riley, Principles, Politics, supra note 106 (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.” Id. All too often, however, 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. For example, in July 2006 an Alaska Native woman reported to the police that she had been raped by a non-Native man. Id. 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. The 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
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. 281

Evidence passing in the other direction—from federal to tribal officials—may fair 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. 282 Instead, the TLOA exempts the “transfer or discloses[ur]e any confidential, privileged, or statutorily protected communication, information, or source to an official of any Indian tribe.” 283 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. 284 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. 285 Nor

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281 See Bill Moyers Journal, supra note 13; Riley, Principles, Politics, supra note 106.
282 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.B. 797 § 102 (a)(1)(A), (2)(A).
283 § 212(c)(1), 124 Stat. at 2268 (“Nothing in this section requires any Federal agency or official to transfer or disclose any confidential, privileged, or statutorily protected communication, information, or source to an official of any Indian tribe.”).
284 § 212(a)(1), (3), 124 Stat. at 2267-2268.
are victims likely to be kept informed of the status of the investigation or prosecution, including whether the suspect has been arrested.\textsuperscript{286}

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.\textsuperscript{287} Thus, tribal courts could only prosecute those cases involving Indian perpetrators. But, more than eighty percent of sexual assaults are committed by non-Indians over whom the tribes have no jurisdiction whatsoever.\textsuperscript{288} Because non-Indians account for all but twenty 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.\textsuperscript{289}

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 the ICRA.\textsuperscript{290} The TLOA increases tribal courts’ authority to punish offenders, but only to a maximum 36 months imprisonment.\textsuperscript{291} The exceedingly weak penalties available to tribal prosecutors to punish such serious offenses as rape and sexual assault make such an option laughable. Nationally, the average sentence for rape is 136 months, while the average for other sexual assaults is 92 months.\textsuperscript{292} Thus, a sexual offender who commits his crime in Indian

\textsuperscript{286} Executive Summary, supra note 38.
\textsuperscript{287} See § 206, 124 Stat. at 2264.
\textsuperscript{288} Pacheco, supra note 18, at 2-4. Moreover, most crimes are not even reported to federal officials. Riley, Justice Broken, supra note 13. Of nearly six thousand aggravated assaults reported in 2006, fewer than ten 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, according to data from the Interior Department and the Transactional Records Access Clearinghouse, or TRAC, at Syracuse University.” Id.
\textsuperscript{289} See Sovereign Tribal Authority, supra note 22, at 1; see also Blumenthal, supra note 22 (citing Justice Department statistics that eighty-six percent of perpetrators are non-Indian men).
\textsuperscript{290} See discussion, infra pp. __, regarding question whether tribes have concurrent jurisdiction over Indian offenders in felonies under the MCA.
Country would be subject to one third to one quarter the penalty if he had committed the same offense outside Indian Country or 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.\footnote{§ 202 (a)(4)(B), 124 Stat. at 2262.} Tribal prosecutors correctly complain that they cannot pursue felony charges regardless of the conduct of the perpetrator.\footnote{Legal Hurdles, supra note 23; Pacheco, supra note 18, at 3.} The TLOA does little to remedy this.\footnote{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 38. 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 (D. AZ Dec. 14, 2009); Bustamante v. Valenzuela, No. CV 09-8192-PCT-ROS (D. AZ Feb. 3, 2010). Tribes also impose non-incarceration penalties such as community service, restitution, or probation. Id.; 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.} 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 towards 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, DEA, BIA, as well as officers associated with other federal agencies.\footnote{COHEN’S HANDBOOK, supra note 48, at 763. Even before the TLOA, tribal police and state law enforcement officers have begun to work together to combat reservation crime. See Richmond, supra note 35. 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}
jurisdictional overlap can create confusion that 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.\textsuperscript{297} 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.\textsuperscript{298} 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.\textsuperscript{299} 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.\textsuperscript{300} 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.\textsuperscript{301}

\textit{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 investigations or making arrests without a tribal officer’s participation. Richmond, \textit{supra} note 35. 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. \textit{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. \textit{Id.} It is hard to dismiss a perception of racism given such an extreme aversion to working with Indian police. See \textit{id.} TLOA may allay some of these concerns, however, by providing more thorough training for tribal police officers.

\textsuperscript{297} \textit{Legal Hurdles, supra} note 23.
\textsuperscript{298} \textit{Legal Hurdles, supra} note 23.
\textsuperscript{299} Richmond, \textit{supra} note 35; \textit{Executive Summary, supra} note 38.
\textsuperscript{300} Blumenthal, \textit{supra} note 22.
\textsuperscript{301} 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. Riley, \textit{Justice Broken, supra} note 13. But, the tribes have not always been willing to fund these efforts or to fully professionalize its police force. \textit{Id.} Some tribes may not be willing—or may simply be financially unable—to pay for increased tribal law enforcement. \textit{Id.} Thus, better funding for law enforcement and functioning tribal economies are essential for
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.\footnote{302}{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 108, at 579-80.} 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.\footnote{303}{See Bill Bolsters Tribal Power, supra note 244; Eid, supra note 20, at 44-45 (discussing support for efforts to repeal Oliphant to permit tribal jurisdiction over more offenses).} 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.”\footnote{304}{§ 202 (a)(2)(B), 124 Stat. at 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. § 235(a), (d), 124 Stat. at 2282, 2283-2284. After this study, the Commission is to make recommendations based on its findings including consideration of simplifying jurisdiction over crimes on reservations. § 235(e), 124 Stat. at 2284.} Nevertheless, this is a solution that Congress may be reluctant to grant because of fears that tribal courts cannot provide adequate justice to nonmembers.\footnote{305}{See Bill Bolsters Tribal Power, supra note 244. 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.} The two primary legal impediments can be overcome if Congress chooses to act.\footnote{306}{See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (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.}
The main impediment to tribal jurisdiction has been concern that accused defendants would not have the benefit of the full panoply of constitutional rights guaranteed by the Constitution.\textsuperscript{307} This concern arises because tribal governments are not bound by the Bill of Rights.\textsuperscript{308} Instead, tribal courts must comply with the Indian Civil Rights Act.\textsuperscript{309} Passed in 1968, ICRA extends nearly all of the rights contained in the Bill of Rights to tribal governments.\textsuperscript{310} In criminal prosecutions, tribal courts must provide most of the same due process rights defendants receive in federal or state courts.\textsuperscript{311} ICRA also provides that defendants can challenge their detention as violative of ICRA through writs of habeas corpus in federal court.\textsuperscript{312} ICRA does not, however, require that tribes provide indigent defendants with a right of appointed counsel.\textsuperscript{313} This omission has been

\textsuperscript{307} Oliphant, 435 U.S. at 211; Eid, supra note 20, at 44-45; Ennis, supra note 108, at 582-83; Wolpin, supra note 141, at 1080; e.g., Patience Drake Roggensack, Plains Commerce Bank’s Potential Collision with the Expansion of Tribal Court Jurisdiction by Senate Bill 3320, 38 U. BALTIMORE L. REV. 29, 37-38 (2008).

\textsuperscript{308} See Oliphant, 435 U.S. at 211; Wolpin, supra note 141, at 1080; Roggensack, supra note 276, 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.” 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).

\textsuperscript{309} Berger, supra note 114, at 1055; 25 U.S.C. § 1301-03.

\textsuperscript{310} 25 U.S.C. § 1302; see Pacheco, supra note 18, at 19-20.

\textsuperscript{311} 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).

\textsuperscript{312} 25 U.S.C. § 1303; Wolpin, supra note 141, at 1080.

\textsuperscript{313} 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 48, at 750-51 for discussion. Further,
cited as a reason to prohibit tribes from prosecuting nonmembers. But, Congress could rectify this shortcoming by amending ICRA to include the right to appointed counsel. Indeed, the TLOA requires that tribal courts provide defense counsel to indigent defendants in conjunction with increasing the penalties tribal courts may mete out.

A further concern is that, unlike the Bill of Rights, the rights contained in ICRA and TLOA are statutory, not constitutional. 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. According to the court, while the Constitution did not bind the tribes, ICRA “confers all the criminal protections [defendants] would receive under the Federal 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. Thus, defendants in state criminal courts are equally without a federal guarantee of that right.

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314 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978); Eid, supra note 20, at 44-45; e.g., Roggensack, supra note 276, 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 277, 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).

315 See Eid, supra note 20, at 46.

316 § 234 (c)(2), 124 Stat. at 2280; 124 Stat. at 2280; 155 Cong. 4315, 4334 (2009) (statement of Sen. Byron Dorgan); Eid, supra note 20, at 46. 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 (2009) (holding that when tribal officers act under color of state law, they are bound by same constitutional provisions as state police officers).


318 Means, 432 F.3d at 935.
Likewise, if Congress amended ICRA to require a right 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. 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.”

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. 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.”

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. In *Means v. Navajo Nation*, Russell Means, an Oglala-Sioux, challenged his conviction by a Navajo tribal court for battery against his father-in-law, a member of the Omaha tribe, and his brother-in-

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

320 *See Oliphant*, 435 U.S. at 211 (expressing concern that non-Indians would be subjected to tribal laws and procedures with which they were unfamiliar); Berger, *supra* note 114, at 1055-59; *see e.g.*, Roggensack, *supra* note 276, at 37–38. While the concern about prosecuting non-Indians in tribal 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 38. 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 sentenced to sixty years in prison. *Id.* His accomplice received a ten year sentence. *Id.*

321 *Oliphant*, 435 U.S. at 210; *see also* Ennis, *supra* note 108, at 555.

322 *Oliphant*, 435 U.S. at 210. *But see* Roberts, *supra* note 34, at 558-59 (discussing due process implications of subjecting nonmember Indians to tribal jurisdiction where they would not receive full due process protections).

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

324 *Means*, 432 F.3d at 935; Roberts, *supra* note 34, at 557.
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. 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.

In rejecting Means’s 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. Considering the 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.” Although “Means’s equal protection argument had real force,” the court nonetheless rejected it on the ground that “federal

325 Means, 432 F.3d at 927.
326 Means, 432 F.3d at 928.
327 Also known as “Duro Fix.” Cordiano, supra note 135, at 266; Roberts, supra note 34, at 544.
329 Means, 432 F.3d at 927.
330 Means, 432 F.3d at 930. In so holding, the court relied on the Supreme Court’s decision in United States v. Antelope. 430 U.S. 641 (1977). In that case, the Court considered an equal protection challenge to the Major Crimes Act. 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 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 646-46 n.7.
331 Means, 432 F.3d at 930.
statutory recognition of Indian status is ‘political rather than racial in nature.’\footnote{Id. at 932; see also Morris v. Tanner, 160 Fed. Appx. 600 (9th Cir. 2005) (cert. denied, 549 U.S. 970 (2006)) (applying Means to hold tribal jurisdiction over nonmember Indian proper).}

More importantly, after determining that jurisdiction was premised on Indian political status rather than race, the court employed the “rational tie” standard articulated in \textit{Morton v. Mancari} to determine whether subjecting nonmember Indians to tribal jurisdiction was rationally tied “to the fulfillment of Congress’ unique obligation toward the Indians.”\footnote{Means, 432 F.3d at 932.} In finding 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.”\footnote{See id. at 933 (“The Navajo reservation, larger than many states and countries, has to be able to maintain order within its boundaries.”).} 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.”\footnote{Id. Before the 1990 amendments, members of the Suquamish tribe testified before Congress that since the Court’s decision in \textit{Duro}, “tribal police were openly taunted, and tribal law flaunted, by non-member Indians.” \textit{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) (prepared statement of Georgia George, Chairperson, Suquamish Indian Tribe); Roberts, \textit{supra} note 34, at 549.} This was especially true given the number of non-tribal members who lived on the Navajo reservation.\footnote{Means, 432 F.3d at 933.} 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.\footnote{Id.} Thus, tribal jurisdiction was essential to ensure Means did not escape criminal responsibility.\footnote{Id.} 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.”\footnote{Id.}

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. 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. Further, the perpetrators of sexual assault are largely escaping any prosecution. In Means, the court was persuaded by fact that the federal government would not prosecute Means for battery because it was not a major crime under MCA. The court was concerned that ultimately Means would escape any appropriate punishment. 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. 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].”

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. 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’s 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. Means had no say in tribal government and was politically a 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

340 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”).
341 See supra p._._._.
342 Means, 432 F.3d at 933.
343 Pacheco, supra note 18, at 3.
344 Eid, supra note 20, at 43; Pacheco, supra note 18, at 3.
not speak the Navajo language. According to Means, he could not participate in tribal civic life: he was barred from holding political office, and from voting in tribal elections. Means contend ed that he was essentially treated the same as any non-Indian, nonmember residing on the reservation.

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. This concern is of particular importance given reservation populations. Currently, the average Indian reservation has more non-Indian residents than Indian residents. On some of the most populous reservations, the vast majority of the reservation’s residents may be nonnative. Further, reservations that employ non-Indian workers or operate casinos or other businesses open to the public also have countless

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346 Means, 432 F.3d at 927.
347 Means Cert Pet. *4-5, 2006 WL 1696525. 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 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.
349 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. Means, 432 F.3d at 932. As noted earlier, one bar to all tribes having competent court systems is financial. Thus, tribes would need improved funding and economies to support criminal courts capable of handling expanded criminal jurisdiction.
350 Berger, supra note 114, at 1071; see also Matthew L.M. Fletcher, Issue Brief, Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty, J. ACS ISSUE GROUPS, 32, 35 (March 2009) (“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/node/8437 (last visited April 1, 2010); Roberts, supra note 34, 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.’”).
351 Berger, supra note 114, at 1071; see also Fletcher, supra note 318 at 35; Roberts, supra note 34, at 541.
non-Indian visitors each day. Crime reports suggest that policing non-Indian residents or visitors is essential to combating reservation crime. Reports of sexual assault indicate that more than eighty percent of perpetrators are alleged to be non-Indian.\textsuperscript{352} Given these demographic realities, prohibiting tribal jurisdiction over non-Indians means tribes are powerless to arrest or prosecute those most responsible for the epidemic of sexual violence in Indian Country.\textsuperscript{353} 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.\textsuperscript{354} 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.\textsuperscript{355} 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.\textsuperscript{356} And

\textsuperscript{352} Pacheco, supra note 18, at 29. 
\textsuperscript{353} Id. at 3-4, 23; see Roberts, supra note 34, at 548-49. 
\textsuperscript{354} 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.” While that case dealt with larceny, the reality today is that federal prosecution of sexual assaults on Indian reservations are likewise virtually nonexistent. 44 F.3d 823, 825 (9th Cir. 1995) (citing & quoting CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 135 (2d ed. 1988)). Continuing to bar tribal jurisdiction means that these crimes will continue to go unpunished. See id. at 825-26 (citing D. GETCHES, ED., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS IN THE FUTURE 33-35 (1978)). 
\textsuperscript{355} 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) (noting that tribal jurisdiction could not lie absent express grant of jurisdiction by Congress). 
clearly, tribal sovereignty is infringed by rules that prohibit tribal jurisdiction over crimes committed on tribal territory.\textsuperscript{357} But even 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.

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 so long as tribes must depend on remote federal officials to police their communities.\textsuperscript{358} Nevertheless, the TLOA persists in vesting the responsibility to police reservations in those who are far removed from the communities that are affected while refusing to permit tribes to more directly combat reservation crime. It is long past time to untie the

\textit{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.

\textsuperscript{357} As Frederick A. Mann explained,

\begin{quote}
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, 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.
\end{quote}

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

\textsuperscript{358} See Eid, \textit{supra} note 20, at 40, 42; Pacheco, \textit{supra} note 18, at 4; Rape Cases Go Uninvestigated, \textit{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 so long as the tribe depends on federal law enforcement to police the reservation. Rape Cases Go Uninvestigated, \textit{supra} note 1.
jurisdictional knots that tie law enforcement hands, that let perpetrators escape punishment, and that leave Indian women without justice.