EMBRACING TRIBAL SOVEREIGNTY TO ELIMINATE CRIMINAL JURISDICTION CHAOS

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INTRODUCTION

American Indians[1] living on reservations experience some of the highest crime rates in the United States.[2] Reservations endure violent crimes, including assault, domestic violence, and rape, at rates 2.5 times higher than the national average.[3] These crimes have an especially strong impact on Indian women: nearly three out of five Indian women are assaulted by their spouses or partners, one in three Indian women are raped in their lifetime, and Indian women living on or near reservations are ten times more likely to be murder victims than are women of any other race.[4] High crime rates are not limited to cases of domestic violence. For example, Indian reservations are also an attractive locale for narcotics manufacturing and

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1. For the purposes of this Note, I will use the terms "American Indians," "Indians," and "Native Americans" interchangeably. These terms do not encompass Alaska Natives and Native Hawaiians.

2. *See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, VICTIM SERVICES, http://www.bia.gov/WhoWeAre/BIA/OJS/VictimServices/index.htm (last updated Feb. 17, 2012) (referring to a 2003 BIA report, which found that American Indians and Alaska Natives are victims of violent crimes at rates more than twice the national average). In 2009, federal, state, and tribal agencies were aware of 5,650 instances of violent crime and 16,131 property crimes on reservations. *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFENSES KNOWN TO LAW ENFORCEMENT BY STATE, TRIBAL, AND OTHER AGENCIES (2009), http://turtletalk.files.wordpress.com/2010/09/2009-crime-in-the-us-copy-of-09tbl11.pdf, *also available at* http://www2.fbi.gov/ucr/cius2009/data/table_11.html.

3. Matthew L.M. Fletcher, *Tribal Law and Order Act Details*, TURTLE TALK (July 19, 2010, 12:58 PM), http://turtletalk.wordpress.com/2010/07/19/tribal-law-and-order-act-details/.

4. Letter from U.S. DEP'T. OF JUSTICE, OFFICE OF THE ASSOC. ATT'Y GEN. TO TRIBAL LEADERS (May 20, 2011), *available at* http://tloa.ncai.org/files/DOJ%20Framing%20Paper%20May%2020%202011.pdf.

trafficking, due to their remote locations[5] and the lack of tribal jurisdiction to prosecute non-Indian offenders.[6]

Despite these exceedingly high instances of crime, Indian women living on a reservation with their non-Indian spouses or partners cannot seek justice in the tribal court system for crimes committed against them by their partners, because under current federal laws, tribes do not have the authority to prosecute crimes committed by non-Indians on reservations.[7] This gap in authority is significant, as over 50% of married Indian women are married to non-Indian husbands, and thousands of unmarried Indian women are in relationships or have children with non-Indian men.[8] Additionally, over 70% of violent crimes against Indian people are committed by non-Indians.[9] In most states, the responsibility for prosecuting on-reservation crimes committed by non-Indians rests solely with the federal government.[10] However, federal prosecutors have insufficient resources to deal with domestic violence and misdemeanor cases.[11] Additionally, some federal prosecutors' offices are hundreds of miles away from reservations,[12] which can inhibit their ability to gather evidence in a timely matter. Evidence suggests that these factors result in federal prosecutors declining to prosecute an average of half of all reservation crimes that are subject to federal jurisdiction.[13]

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5. *See, e.g.*, Amy Harris, *Marijuana Growers Find Cover on Tribal Lands*, THE SEATTLE TIMES, Aug. 23, 2011, http://seattletimes.nwsource.com/html/localnews/2015994763_potbusts24m.html.

6. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (holding that Indian tribes do not have the authority to prosecute non-Indians for crimes committed on reservations); *see also infra* Part I-C.

7. *See id.*; *see also infra* Part I-C.

8. Letter from U.S. DEP'T. OF JUSTICE OFFICE OF THE ASSOC. ATT'Y GEN. TO TRIBAL LEADERS (May 20, 2011), *available at* http://tloa.ncai.org/files/DOJ%20Framing%20Paper%20May%2020%202011.pdf.

9. *See* PAUL STEELE ET AL., CRIME AND THE NEW MEXICO RESERVATION: AN ANALYSIS OF CRIME ON NATIVE AMERICAN LAND (1996–2002), EXEC. SUMMARY 2 (Oct. 2004), *available at* http://www.dwiresourcecenter.org/downloads/pdf/NavajoCrimeAnalysis.pdf.

10. *See infra* Part I-C. However, six states have been granted authority to prosecute on Indian lands. 18 U.S.C. § 1162(a) (2006).

11. *See* Victor H. Holcomb, *Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. REV. 761, 767 (1999) (citing ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW, CASES AND MATERIALS 279 (3d ed. 1991)) (arguing that due to limited funding, the federal government is generally not equipped to prosecute many non-major crimes, resulting in lower prosecution rates for non-major reservation crimes).

12. *See, e.g.*, AMNESTY INT'L, MAZE OF INJUSTICE: ONE YEAR UPDATE 6 (2008), http://www.amnestyusa.org/pdfs/MazeOfInjustice_1yr.pdf; Holcomb, *supra* note 11, at 767 (noting that the Fort Peck Reservation in Montana is over 250 miles away from the nearest federal prosecutor's office).

13. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEP'T OF JUSTICE: DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3, 10 (2010) (42% of declinations

Tribal sovereignty is essential to the continued existence and well-being of American Indian communities. Tribes are considered a "third sovereign" within the United States—in addition to the state and federal governments—and have been recognized as such since the early history of the United States.[14] The federal government has signed treaties with many tribes, recognizing and establishing a government-to-government relationship between the United States and tribes.[15] Despite this recognition of the unique political status of Indian tribes, the federal government has chipped away at tribal sovereignty since the treaty-making period that took place when the United States was in its infancy.[16] One of the first laws passed for this purpose was the Major Crimes Act of 1885 (MCA), which extended federal law for major crimes, such as rape and murder, into Indian reservations and provided for federal jurisdiction over Indian defendants who committed those crimes.[17] The MCA challenges tribal sovereignty by imposing federal law where tribes had preexisting mechanisms for handling criminal disputes.[18]

In addition to the MCA, a number of other statutes and court decisions have limited Indian tribes' ability to independently prosecute crimes committed within their geographic boundaries.[19] This is part of the reason that on-reservation crime rates are extremely high, prosecution rates are low, and tribal sovereignty is impaired.[20] In 2010, Congress attempted to fix some of the problems resulting from this dysfunctional policy, by passing the Tribal Law and Order

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resulted from weak or insufficient admissible evidence), *available at* http://www.gao.gov/new.items/d11167r.pdf. *See also* Felicia Fonseca & Sudhin Thanawala, *U.S. Declines to Try Half the Crimes on Tribal Lands*, AZCENTRAL (May 31, 2011), http://www.azcentral.com/news/articles/2011/05/31/20110531arizona-tribal-crimes-not-pursued.html#ixzz1O1ya0GYJ; Ledyard King, *GAO Report: Half of all Reservation Crime is not Prosecuted*, THE BUFFALO POST, (Dec. 15, 2010), http://buffalopost.net/?p=13075 (the declination rate for South Dakota is 61%, while for Arizona it is 38%).

14. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) (finding that the Cherokee nation is "a distinct political society, separated from others, capable of managing its own affairs and governing itself . . . .").

15. Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 657 (2009).

16. *See infra* Part I.

17. 18 U.S.C. § 1153 (2006).

18. *See* Warren Stapleton, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 350 (1997).

19. *See infra* Parts I & III.

20. NAT'L CONGRESS OF AM. INDIANS, TRIBAL LAW AND ORDER BACKGROUND, http://www.ncai.org/fileadmin/Tribal%20Law%20and%20Order%20Background.pdf (last visited Feb. 4, 2011) ("Federal officials have declined to prosecute 50% of alleged violent crimes in Indian country, including 75% of alleged sex crimes against women and children.").

Act (TLOA) in July 2010.[21] Congress and the executive branch have also started to show more interest in recognizing and restoring tribal sovereignty,[22] but none of the proposed legislation fully supports Indian tribal sovereignty.

This Note argues that the current federal laws regarding tribal criminal jurisdiction are contrary to existing policies that recognize inherent tribal sovereignty, and that to fully restore tribal sovereignty and reduce reservation crime rates, Congress should revise the MCA and the TLOA to comprehensively address the legal barriers that adversely affect tribes' ability to prosecute crimes committed within their geographic borders. Part I outlines the historical progression of laws addressing criminal jurisdiction in Indian Country and identifies the problems with the law's disregard and displacement of tribal sovereignty. Part II examines the current state of criminal jurisdiction on reservations—focusing on the lack of tribal input, legal ambiguities, and the under-inclusive nature of the existing laws—and argues that recent shifts in federal policy support broader recognition of inherent tribal sovereignty. Part III explains why the current TLOA, when examined in the context of historical acts of Congress and court decisions, does not go far enough to fix either the barriers imposed on tribal sovereignty or the problems of reservation crime. Part IV proposes revisions to the MCA and the TLOA to promote tribal sovereignty and simplify criminal jurisdiction in Indian Country.

I. HISTORICAL SURVEY OF CONGRESSIONAL ACTS AND SUPREME COURT DECISIONS DEALING WITH INDIAN SOVEREIGNTY AND ON-RESERVATION CRIME

The following historical overview of the expansion of federal criminal jurisdiction into Indian Country illustrates how traditional tribal authority over crimes committed within the tribes' geographical jurisdiction has been eroded by Congressional policies that promoted assimilation rather than sovereignty.

A. Criminal Jurisdiction in Indian Country Prior to the MCA

During the early 1800's, the U.S. Supreme Court, under Chief Justice John Marshall, recognized that Indian tribes possessed in-

21. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified as amended in various sections of 25 U.S.C.).

22. *See infra* Part II.

herent sovereignty over their own affairs, and recognized only two limitations on tribal sovereignty.[23] First, tribes could not enter into treaties with foreign nations because they are not themselves foreign nations, but rather are "domestic dependant nations" that have a special relationship with the United States government.[24] Second, tribes could not legally convey their land to any person or entity other than the federal government.[25] Justice Marshall's characterization of tribal sovereignty in these early cases illustrates the most important facet of tribal sovereignty: the powers exercised by Indian tribes are inherent powers that they possessed even before the creation of the United States, not powers granted to tribes by the federal government.[26]

From 1778 until 1883, the United States signed numerous treaties with Indian tribes.[27] Some of these treaties stipulated how crimes or offenses by non-Indians against Indians, and vice versa, would be prosecuted.[28] One example of sovereignty recognition appears in the 1778 Treaty with the Delaware Nation. This treaty required that crimes committed by U.S. citizens against the Delaware people, and vice versa, be prosecuted and tried impartially by judges or juries from both nations.[29] This procedure treated the Delaware as a sovereign nation, creating a cooperative system to deal with crime. A number of scholars, including Professor Robert Clinton, have found that these treaties often recognized the sovereignty of Indian tribes, and therefore the tribes' jurisdiction over crimes committed on their territories.[30]

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23. *See infra* notes 24–25 and accompanying text.

24. *See id.* at 17; Worcester v. Georgia, 31 U.S. 515, 560–61 (1832) (holding that the Cherokee nation is a distinct community "in which the laws of Georgia [could] have no force," and that therefore the federal government had exclusive authority over Indian affairs).

25. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) (describing the "doctrine of discovery," by which European powers obtained sovereignty over all American land by virtue of "discovering" it and granted the discovering nation the exclusive right to extinguish the occupancy rights of indigenous land occupants).

26. The existence of inherent tribal sovereignty also prevents the states from intruding on tribal affairs. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 220 (1959).

27. Charles J. Kappler, ed., Indian Affairs: Laws and Treaties: Vol. II Treaties in Part (1904), *available at* http://digital.library.okstate.edu/kappler/vol2/toc.htm.

28. *See, e.g.*, Treaty with the Cherokees, July 19, 1866, art. XIII, 14 Stat. 803 ("[T]he judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation . . . shall be the only parties, or where the cause of action shall arise in the Cherokee Nation . . . ."); Treaty with the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 14.

29. *See* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953 (1975).

30. *See id.* at 953–56.

However, throughout the early 1800s, this recognition of Indian jurisdiction began to recede, as more treaties shifted from a land-based notion of jurisdiction—under which jurisdiction was based on the location of the crime—to a citizenship-based notion of jurisdiction—under which jurisdiction was based on the status of the perpetrator, the victim, or both.[31]

By the late nineteenth century, U.S, policy toward Indian tribes became an overt effort to eliminate Indian peoples through assimilation and destruction of tribal sovereignty.[32] First, Congress officially stopped signing treaties with Indian tribes in 1871.[33] The federal government also forced Indian children to attend boarding schools.[34] These schools were often located far from reservations and had policies intended to assimilate Indian children into Anglo-American culture, such as forcing them to cut their hair and learn English.[35] Additionally, the federal government confined Indians to reservations, and extended federal laws to reservations[36] in order to lead Indians from "savagery"[37] to civilization. This view is reflected in the Secretary of the Interior's 1879 annual report: "If the Indians are to be advanced in civilized habits, it is essential that they be accustomed to the government of law, with the restraints it imposes and the protection it affords."[38]

In the 1880s, the most outright attack on tribal sovereignty followed the murder of Brule Chief Sin-ta-ge-le-Scka ("Spotted Tail"). Spotted Tail served as Chief of the Brule Sioux from 1865 until his death.[39] Another Brule named Crow Dog had also held a leadership role within the tribe, as leader of the tribal police force, until

31. *See id.* at 955.

32. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8–9 (1995).

33. *See, e.g.*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 116 (5th ed. 2009).

34. COLIN G. CALLOWAY, FIRST PEOPLES: A DOCUMENTARY SURVEY OF AMERICAN INDIAN HISTORY 345-51 (2d ed. 2004).

35. *See* Charla Bear, *American Indian Boarding Schools Haunt Many*, NAT'L PUB. RADIO (May 12, 2008), http://www.npr.org/templates/story/story.php?storyId=16516865.

36. Galloway, *supra* note 34, at 344.

37. In 1880, the Board of Indian Commissioners expressed support for educating Indian peoples: "As a savage, we cannot tolerate him any more than as a half-civilized parasite, wanderer, or vagabond. The only alternative left is to fit him by education for a civilized life."). Galloway, *supra* note 34, at 344. The perception of Indian people as savages was also part of colonizing discourse prior to the formation of the United States. *See generally,* Robert A. Williams Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law,* 31 ARIZ. L. REV. 237, 246 (1989).

38. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 136 (1994).

39. *See id.* at 106. For more on Spotted Tail's leadership role within Brule society, *see id.* at 106–09.

Spotted Tail removed him from the position in 1880.[40] On August 5, 1881, Crow Dog shot and killed Spotted Tail.[41] The families of Crow Dog and Spotted Tail put an end to the murder dispute through a traditional Brule form of retributive justice: Crow Dog's family promptly paid Spotted Tail's family $600, eight horses, and one blanket.[42] On August 7, an Indian agent[43] arrested Crow Dog, knowing that the families had already settled the dispute through Brule law.[44] A murder trial in the Dakota Territory District Court followed, and the jury found Crow Dog guilty and sentenced him to death by hanging.[45]

Crow Dog appealed his conviction under a writ of habeas corpus, arguing that the Dakota Territory court—a federal court—did not have jurisdiction because the crime occurred on Indian land and the victim was Indian.[46] The Supreme Court agreed and overturned Crow Dog's conviction.[47] The Court described the case as one where United States law was being imposed:

> over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, . . . which judges them by a standard made by others and not for them, . . . and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, . . . and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[48]

The Supreme Court recognized that the Brule had its own traditions for dealing with crimes committed by its members against other Indians, and that these traditions did not align with the law

40. *See id.* at 107–08.
41. *See id.* at 1.
42. *See id.* at 110.
43. An Indian agent was a person appointed by the federal government to act as a liaison between a tribe and the federal government. These agents were often responsible for enforcing treaty obligations and settling disputes. *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 14, 20 (5th ed. 2009).
44. *See id.*
45. *See id.* at 1.
46. *See* Crow Dog, 109 U.S. 556, 557 (1883).
47. *See id.* at 572.
48. *Id.* at 571.

the United States imposed on Crow Dog. Because the Brule had already resolved the murder case under its own justice system, the Court ordered Crow Dog's release.[49]

A very vocal public reaction resulted from *Crow Dog*. The decision shocked many Americans who simply could not believe that an Indian could get away with murder and that the U.S. government could not do anything about it.[50] In 1883, the Indian Rights Association, an activist group who claimed to be devoted to the well-being of Indian people, issued a pamphlet titled "The Indian Before the Law," which advocated for imposing United States law on reservations and called for "some firm and consistent power on a reservation that shall systematically and impartially enforce such simple rules of morality and justice as do not conflict too hardily with the primitive character of Indian customs or ideas . . . ."[51] Congressional outcry also followed from the case. Some Congressmen could not accept that an Indian could escape severe punishment for a crime like murder.[52] Within approximately one year of the *Crow Dog* decision, Congress overrode the Supreme Court's decision by enacting the Major Crimes Act (MCA), which placed major crimes committed by Indians against Indians on reservations under federal jurisdiction.[53] During the Congressional debate over the MCA, Congressmen repeatedly expressed a desire to spread civilization to Indians.[54] Michigan Representative Byron Cutcheon, the sponsor of the bill,[55] justified its passage by emphasizing the lawless nature of uncivilized Indians and tribes:

> It is . . . a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe . . . . If . . . an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except . . . the law of the tribe, which is just no law at all.[56]

49. *See id.* at 572.
50. *See* Harring, *supra* note 38, at 101.
51. *Id.*
52. *See* 16 CONG. REC. 934–38 (1885).
53. *See* Harring, *supra* note 38, at 101.
54. *See* 16 CONG. REC. 934–38 (1885).
55. *See id.* at 934.
56. *Id.*

Representative Cutcheon also pointed out that the Secretary of the Interior's annual report from the previous year decried the Supreme Court's decision in *Crow Dog* and asked Congress to override the Court's decision.[57] Representative Cutcheon quoted from the report:

> If offenses of this character can not be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished . . . . If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen.[58]

Congress passed the bill by a vote of 240–7, with 77 not voting.[59]

In its current form, the MCA subjects Indians to federal jurisdiction for certain crimes committed within Indian Country[60] against another Indian.[61] These crimes include murder, manslaughter, kidnapping, maiming, incest, various forms of assault, various federal felony charges, felony child abuse or neglect, arson, burglary, and robbery.[62] Indians prosecuted under the MCA are subject to "the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."[63] If no federal law defines and punishes an offense listed in subsection (a), the crime will still be subject to federal jurisdiction, but will be defined and punished according to the law of the state containing the reservation where the crime occurred.[64] Notably, the MCA did not define who is an Indian person.

Within a few months of Congress' passage of the MCA, Indians challenged its constitutionality.[65] Kagama, a Klamath Indian, murdered another Indian on the Hoopa reservation.[66] The case was quickly certified to the Supreme Court for a ruling on whether the federal district court had jurisdiction over Kagama's crime.[67] The

57. *See id.* at 935.
58. *Id.*
59. *See id.* at 938.
60. The MCA defines Indian Country as "all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . all dependent Indian communities within the borders of the United States . . . and Indian allotments . . . including rights-of-way running through the same." 18 U.S.C. § 1151 (2006).
61. *See id.* § 1153.
62. *See id.* § 1153(a).
63. *See id.*
64. *See id.* § 1153(b)
65. *See* United States v. Kagama, 118 U.S. 375, 375 (1886).
66. *See id.* at 376.
67. *See id.* at 375–76.

Supreme Court upheld the MCA and ruled that the district court could exercise jurisdiction over Kagama.[68] The Court found that the MCA was a constitutional exercise of congressional power,[69] and expressed for the first time the doctrine of congressional plenary power over Indian affairs.[70]

The Court asserted that Indian tribal sovereignty exists as a power secondary to that of Congress, and that Congress' power over Indian tribes is plenary.[71] Tribes are allowed to exercise their sovereignty subject only to the whims of Congress, which can revoke a tribe's ability to exercise sovereignty whenever it wants, so long as it makes clear its intent to limit tribal sovereignty.[72]

B. Statutory Limits on Tribal Sovereignty and Jurisdiction After the Major Crimes Act

Following the Supreme Court's approval of legislation limiting tribal sovereignty based on the *Kagama* theory of congressional plenary power, Congress continued to pass laws intended to break up tribal lands and governments. In February 1887, it issued the Dawes General Allotment Act.[73] The Allotment Act divided lands held by tribes into individual parcels, or allotments, and government agents distributed the parcels to individual Indians.[74] The surplus parcels could then be sold to non-Indians to break up reservations.[75] Allotment resulted in complex checkerboard reservations, with Indians living on tribal lands that were directly adjacent to non-Indians living on private lands.[76] The effects of allotment are still visible on many reservations today, complicating the determination of which sovereign has jurisdiction over crimes because it is often

68. *See id.* at 385.
69. *See id.* at 384–85.
70. The Court described this plenary power as follows:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else[.]

Id. at 379–80, 384–85.
71. *See id.*
72. *See* United States v. Lara, 541 U.S. 193, 200–04 (2004).
73. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000).
74. *See id.*
75. *See id.*
76. *See id.*

difficult to determine whether a crime has occurred on or off of reservation land.[77]

In 1953, Congress announced its new formal policy to terminate the sovereign existence of some Indian tribes.[78] Congress's stated goal in terminating tribal status was to aid in assimilation of tribal members as rapidly as possible, making Indians subject to "the same privileges and responsibilities as are applicable to other citizens of the United States."[79] Under the termination policy, Congress passed statutes eliminating the tribal status of over one hundred tribal groups.[80] In addition to ending the government-to-government relationship between the United States and terminated tribes, the termination policy also transferred jurisdiction over former tribal lands to the states and erased Indian status from members of terminated tribes, removing them from the authority of the MCA.[81]

Congress supplemented the termination policy by passing Public Law 280 that same year.[82] Public Law 280 transferred criminal and civil jurisdiction over Indian reservations from Indian tribes and the federal government to the states, but only in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[83] Today, those states continue to exercise jurisdiction over reservation crime.[84]

The Indian Civil Rights Act (ICRA), passed in 1968, limited the ability of tribal courts to impose prison sentences on defendants.[85] Under the ICRA, a tribal court could only sentence defendants to prison terms of up to six months in length per offense and impose a $500 fine.[86] This portion of the ICRA severely limits tribal sovereignty because it prevents tribal governments from exercising full discretion to determine how to punish crimes committed on Indian land. Since the passage of the ICRA, several tribes have

77. For a general discussion of jurisdictional problems following allotment policy, *see* Harring, *supra* note 38, at 153–58.

78. H.R. Con. Res. 108, 83d Cong. (1953). Following this resolution, Congress passed additional statutes formally terminating tribes.

79. Id.

80. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 61 (5th ed. 2009).

81. *Id.* at 61–62.

82. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360 (2006)). *See also* 25 U.S.C. § 1321 (regarding the transfer of criminal jurisdiction to states) and 25 U.S.C. § 1322 (regarding the transfer of civil jurisdiction to states).

83. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006).

84. The system of state supervision over Indian reservation presents its own problems that are beyond the scope of this Note.

85. 25 U.S.C. § 1302(7) (1968), *amended by* 25 U.S.C. § 1302(7) (2006).

86. 25 U.S.C. § 1302(7) (1968), *amended by* 25 U.S.C. § 1302(7) (2006). *See also* http://www.tribal-institute.org/lists/icra.htm.

explicitly adopted its language into their own tribal constitutions.[87] This is likely because tribal constitutions must be approved by the Secretary of the Interior, who has authority to reject constitutions that do not incorporate the ICRA's civil rights protections.[88]

C. Supreme Court Limits on Tribal Sovereignty and Criminal Jurisdiction After the MCA

Over the past twenty years, Indian policy development within both the executive and legislative branches has gradually shifted away from encouraging assimilation to promoting tribal sovereignty.[89] Although elected representatives have started making positive changes, the judicial branch remains hostile to tribal interests and has imposed severe limits on tribal sovereignty and tribal jurisdiction over non-Indians.

By the 1970s, federal courts developed a set of canons of construction to aid the interpretation of treaties and statutes specifically concerning Indian tribes.[90] First, treaties between Indian tribes and the federal government were to be interpreted as the Indians themselves would have understood the treaties at the time of drafting.[91] Second, textual ambiguities were to be interpreted in the favor of Indians.[92] Third, any rights not explicitly removed by a treaty, statute, or regulation are retained by Indian tribes.[93]

The Supreme Court both ignored decades of these developed treaty interpretation precedents and damaged tribal sovereignty with its 1978 decision in *Oliphant v. Suquamish Indian Tribe*.[94] In *Oliphant*, a non-Indian defendant challenged his Suquamish tribal court conviction for assaulting a tribal officer and resisting arrest.[95] The defendant argued that the tribal court did not have authority to exercise criminal jurisdiction over non-Indian defendants, even

87. *See, e.g.*, LITTLE RIVER BAND OF INDIANS OF MANISTEE, MICH. CONST.; KICKAPOO TRADITIONAL TRIBE OF TEX. CONST.

88. 25 U.S.C. § 476(d)(1) (2006) ("[T]he Secretary shall approve the constitution . . . unless the Secretary finds that the proposed constitution [is] . . . contrary to applicable laws.").

89. *See infra* Part II.

90. *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623, 624 (2011).

91. *See* Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919).

92. *See* Choate v. Trapp, 224 U.S. 665, 675 (1912).

93. *See* Mattz v. Arnett, 412 U.S. 481, 504–05 (1973); *See also* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623, 624–25 (2011).

94. 435 U.S. 191, 191 (1978).

95. *See id.* at 194.

those defendants who resided on the reservation and committed crimes on the reservation.[96] At the time of that case, 33 of 127 tribal court systems actively extended their jurisdiction over non-Indians.[97]

Rather than deciding the case on narrower grounds and ruling solely on the issue of Suquamish tribal court jurisdiction, the Supreme Court ruled that *all* Indian tribes could not prosecute non-Indians who commit crimes on reservations.[98] Instead, the Court found that federal courts had *exclusive* jurisdiction over these defendants (and in P.L. 280 states, state governments have exclusive jurisdiction).[99] In reaching its decision, the Court analyzed several nineteenth century treaties, including the 1855 Treaty of Point Elliot signed by the Suquamish.[100] Although the Court admitted that the treaty was "silent as to tribal criminal jurisdiction over non-Indians,"[101] it went on to interpret ambiguous treaty language, which indicated that the Suquamish were "dependent" on the United States, *against* the Suquamish's tribal sovereignty interests,[102] in a manner contrary to the second canon of treaty construction. The Court also analyzed several statutes regarding federal enclaves, western territory settlement, and other statutes vaguely related to Indian policy.[103] The Court admitted that its conclusion—that Congress viewed Indian tribal courts as not having criminal jurisdiction over non-Indians—was based on an "unspoken assumption" implicitly present in each of those statutes.[104] This assumption violated the third canon of construction. The Court stated that "Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians . . . [but we conclude that] Congress consistently believed this to be the necessary result of its repeated legislative actions."[105] The Court found that Indian tribes "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[106] In a short dissent, Justice Marshall

96. *See id.* at 195.
97. *See id.* at 196.
98. *See id.* at 195.
99. *See id.* at 212.
100. *See id.* at 206.
101. *See id.*
102. *See id.* at 207 (citing the Treaty of Point Elliot art. 9, Jan. 27, 1855, 12 Stat. 927, which states that the Suquamish "acknowledge their dependence on the government of the United States"). The Supreme Court interpreted that language to mean that "the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders." *Oliphant*, 435 U.S. at 207.
103. *See Oliphant*, 435 U.S. at 203.
104. *See id.*
105. *See id.* at 204.
106. *See id.* at 208.

adhered to the canons of construction, stating that "[i]n the absence of affirmative withdrawal by treaty or statute . . . Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation."[107]

The other implication of *Oliphant* is that jurisdiction over a crime committed on an Indian reservation was thereafter explicitly determined by a person's status as an Indian or non-Indian.[108] As a result, the *Oliphant* decision further emphasized the importance of being able to determine whether a defendant is an Indian. For these reasons, *Oliphant* continues to face intense criticism as an overreach of judicial power.[109]

United States v. Antelope[110] further explained the impact of the MCA on criminal jurisdiction based on Indian status. The case arose when two Indian defendants charged under the MCA challenged their convictions for a murder committed on a reservation.[111] The defendants argued that the MCA violated the Constitution because their status as Indians subjected them to a different set of laws than a person of non-Indian status.[112] The Supreme Court found that the MCA did not violate the Equal Protection Clause of the Fourteenth Amendment because defendants prosecuted under the MCA are prosecuted because of their political affiliation as tribal members, not because of their racial status as Indians.[113]

In 1990, the Supreme Court struck yet another blow to tribal sovereignty in *Duro v. Reina*.[114] In *Duro*, the Court held that Indian tribes could not prosecute non-member Indians—Indians from other tribes—who committed crimes on a reservation in which they were not enrolled tribal members.[115] Congress acted quickly

107. *See id.* at 212 (Marshall, J., dissenting).

108. *See id.*

109. *See, e.g.*, Geoffrey C. Heisey, Oliphant *and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1062–71 (1998); Marie Quasius, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902, 1935–40 (2009); Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 12 KAN. J.L. & PUB. POL'Y 59, 60, 65–66 (2003).

110. 430 U.S. 641, 641 (1977).

111. *See id.* at 644.

112. *See id.*

113. *See id.* at 646–47 (1977). However, determining whether someone is Indian is not always dependant on tribal status. *See infra* Part III. Some courts have found that *non-enrolled* tribal members with Indian heritage are nevertheless subjected to the MCA. *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 763–64. (8th Cir. 2009).

114. 495 U.S. 676, 676 (1990), *superseded by statute*, Pub. L. No. 101-511, 104 Stat. 1856, 1892–93, *as recognized in* United States v. Lara, 541 U.S. 193, 194 (2004).

115. *See Duro*, 495 U.S. at 684–88.

following the *Duro* case to create a statutory "Duro Fix."[116] The fix revised the ICRA to allow tribes to prosecute any Indian who committed crimes on their reservations, even if the Indian defendant was not an enrolled member of that tribe.[117] However, the "Duro Fix" did not restore tribal authority to prosecute non-Indians who committed on-reservation crime.

Under the current state of federal law, criminal jurisdiction over crimes committed on reservations generally follows the patterns illustrated in the following chart:[118]

	"Major" Crime, as Defined by MCA	**All Other Crimes**
Indian perpetrator, Indian victim	Federal Jurisdiction (under MCA) and Tribal Jurisdiction	Tribal Jurisdiction
Indian perpetrator, Non-Indian victim	Federal Jurisdiction (under MCA) and Tribal Jurisdiction	Federal (under General Crimes Act) and Tribal Jurisdiction
Non-Indian perpetrator, Indian victim	Federal Jurisdiction (under General Crimes Act)[119]	Federal Jurisdiction (under General Crimes Act)
Non-Indian perpetrator, Non-Indian victim	State Jurisdiction	State Jurisdiction

Despite years of policy adversely affecting tribal rights, the United States has recognized that "tribal powers of self-government are not lost merely by failure to exercise or assert them, even over a long time."[120] As the next section demonstrates, Congress recently took steps to reduce the problems of on-reservation crime, though not by restoring tribal sovereignty.

116. 25 U.S.C. § 1301 (2006).

117. 25 U.S.C. § 1301(2) (2006) (" '[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals . . . including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.").

118. *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, http://www.tribal-institute.org/lists/jurisdiction.htm (last visited Feb. 21, 2012). This chart does not apply to jurisdictions where Public Law 280 or other federal statutes transferring jurisdiction to states are in force.

119. The General Crimes Act, enacted in 1817, creates federal jurisdiction, with some judicially imposed limits, for "non-major" crimes committed in Indian Country by non-Indians against Indians and for some crimes committed by Indians against non-Indians. *See* 18 U.S.C. § 1152 (2006). This section of the Code is also sometimes referred to as the Indian Country Crimes Act or the Federal Enclaves Act.

120. Brief for the United States as Amicus Curiae Supporting Respondents, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1977) (No. 76-5729).

II. THE CURRENT STATE OF FEDERAL POLICY REGARDING TRIBAL SOVEREIGNTY & CRIMINAL JURISDICTION IN INDIAN COUNTRY

The election of President Barack Obama in 2008 began a marked shift in federal policy towards Indian tribes, both in words and in practice. In November 2009, President Obama held the second-ever Tribal Nations Conference, in which he invited various tribal leaders to Washington D.C. to interact with the federal government on a nation-to-nation basis.[121] In his address opening the conference, the President acknowledged that "Washington can't—and shouldn't—dictate a policy agenda for Indian Country. Tribal nations do better when they make their own decisions . . . . Today's sessions are part of a lasting conversation that's crucial to our shared future."[122] During the Tribal Nations Conference, President Obama also issued a memorandum outlining his administration's commitment to consulting with Indian tribes about laws and policies affecting their communities, stating that "[c]onsultation is a critical ingredient of a sound and productive Federal-tribal relationship."[123]

In July 2010, Congress passed the Tribal Law & Order Act.[124] Congressional hearings prior to the bill's enactment shed light on serious problems with violent reservation crime, especially crimes against women and children.[125] Statements at these hearings described the federal government's trust responsibility to Indian tribes and alleged that the federal government's failure to prosecute on-reservation crime when it was the only body with jurisdiction to prosecute constituted a failure to meet its trust obligations.[126] In the final bill, Congress recognized that the United States has "distinct legal, treaty, and trust obligations to provide for

121. Lise Balk King, *Tribes Look Back to Move Forward: Obama's Monumental Challenge in Indian Country*, PECHANGA, http://www.victor-rocha.com/articles/Obama's%20monumental%20challenge%20in%20Indian%20Country%20110409.htm (last visited Feb. 23, 2012). The first tribal conference occurred under President Clinton in 1994. *See id.*

122. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

123. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

124. Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

125. *See, e.g.*, *The Tribal Law and Order Act of 2009: Hearing on H.R. 1924 Before the Subcomm. of Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2–3 (2009) (statement of Thomas J. Perrelli, Assoc. Att'y Gen.); *see also id.* (statement of Scott Burns Esq., Exec. Dir., National District Attorney Association).

126. *See id.* (statement of Thomas J. Perrelli, Assoc. Att'y. Gen.).

the public safety of Indian Country."[127] The TLOA seeks to create more accountability for federal prosecutors, to improve coordination with tribal governments, and to strengthen tribal criminal justice programs, including tribal police and courts.[128]

On July 21, 2010, President Obama praised Congress for its passage of the Tribal Law and Order Act (TLOA).[129] He noted that the Act would help reduce reservation crime rates by increasing cooperation between tribes and the federal government to investigate and prosecute crimes, and by providing additional resources to tribal governments to more effectively fight on-reservation crimes.[130] President Obama also recognized that the federal government's relationship with tribal governments, as defined by treaties and other laws, compelled Congress to create the TLOA.[131]

In order to improve the prosecution rates for Indian Country crimes, the TLOA imposes new accountability requirements on U.S. Attorneys. The Attorney General must collect and report data about Indian Country crimes on an annual basis,[132] compile information about all crimes U.S. Attorneys declined to prosecute (including data about the accused and victims' statuses as Indians or non-Indians), and coordinate their prosecution with tribal justice officials.[133] U.S. Attorneys are also given more resources to deal with reservation crime, including new "Assistant U.S. Attorney Tribal Liaisons"[134] who work with U.S. Attorneys to ensure that United States Attorneys Office (USAO) policies are "effective, consistent, and in compliance with the overall directive to improve the government-to-government relationship with each sovereign [Indian] nation."[135]

The TLOA also mandates increased communication and coordination between federal, state, and tribal law enforcement and court systems. Federal law enforcement agents are now required to communicate regularly with tribal leaders, tribal victims' advocates, tribal justice officials, and other tribal representatives regarding

127. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202 (a)(1), 124 Stat. 2258, 2262 (codified as amended in scattered sections of 25 U.S.C.).

128. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, Regent U. L. Rev. 139 165–75 (2010).

129. Statement on Congressional Passage of Tribal Law and Order Legislation, 2010 DAILY COMP. PRES. DOC. 618 (July 21, 2010).

130. *See id.*

131. *See id.*

132. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 211(b)(14), 124 Stat. 2258, 2265.

133. *See id.* § 212(a)(3)–(4), 124 Stat. 2258, 2267.

134. *See id.* §§ 13(a)–13(b), 124 Stat. 2258, 2268–69.

135. *Native American Tribes and Tribal Liaison*, THE U.S. ATT'Y OFF. FOR THE W. DISTRICT OF MICH., (Jan. 22, 2012), http://www.justice.gov/usao/miw/programs/native.html.

public safety concerns and criminal regulatory policies.[136] Additionally, the Secretary of the Interior must coordinate with tribes to create long-term "tribal detention programs," which allow tribes to contract with state and federal facilities to incarcerate criminals and develop alternatives to incarceration.[137]

The TLOA also seeks to develop tribal law enforcement agencies by providing more resources to tackle on-reservation crime. The TLOA granted tribal law enforcement agencies access to the National Criminal Information Center and other national crime databases.[138] Tribal law enforcement officers are required to be trained according to the same standards as federal law enforcement officers,[139] which may improve their effectiveness.

Lastly, the TLOA amends portions of the ICRA to increase the power of tribal courts.[140] For example, restrictions related to tribal court sentencing have been relaxed.[141] Prior to the TLOA, tribal courts could not sentence any defendant to imprisonment of more than one year or a fine of more than $5,000, pursuant to the Indian Civil Rights Act's 1986 amendments.[142] Following the TLOA, tribal courts can sentence defendants to imprisonment of up to three years for certain crimes.[143] However, Congress made it clear that "nothing in [the TLOA] confers on an Indian tribe criminal jurisdiction over non-Indians."[144] The Attorney General and Secretary of the Interior must submit a report in 2014 that addresses whether enhanced tribal court sentencing authority has improved violent crime rates on reservations, and must make recommendations about whether to discontinue or enhance tribal sentencing authority.[145]

Although the TLOA was a noble effort by Congress to fix some of the criminal justice problems occurring on reservations, the TLOA does not go far enough to return criminal prosecutorial authority and sovereignty to tribes. It also does not fully comply with the principles of the United Nations Declaration on the Rights of

136. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 211(b)(11)–(12), 124 Stat. 2258, 2264 (codified as amended in scattered sections of 25 U.S.C.).

137. *See id.* § 211(f), 124 Stat. 2258, 2266.

138. *See id.* § 211(b)(13), 124 Stat. 2258, 2264.

139. *See id.* § 231(a)(1)(B), 124 Stat. 2258, 2272–73.

140. *See id.* § 234, § 1302, 124 Stat. 2258, 2279–82.

141. *See id.*

142. 25 U.S.C. § 1302(7) (2006). *See also* TRIBAL LAW AND POLICY INSTITUTE, INDIAN CIVIL RIGHTS ACT, http://www.tribal-institute.org/lists/icra.htm.

143. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 1302, 124 Stat. 2258, 2279–82 (codified as amended in scattered sections of 25 U.S.C.).

144. *See id.* § 206, 124 Stat. 2264.

145. *See id.* § 234(f), 124 Stat. 2281.

Indigenous Peoples (UNDRIP).[146] The Obama administration endorsed the UNDRIP in December 2010 at the second annual Tribal Nations Conference.[147] It is a non-binding, aspirational document, but one with international consensus represented by over 144 nations voting in favor of its adoption in 2007.[148] UNDRIP recognizes that indigenous peoples have rights under international law, including the right to self-determination and free determination of their political status, the right to autonomy or self-government in matters relating to their internal affairs, and the right to participate in decision-making on matters affecting their rights.[149] Although it is non-binding, the executive and legislative branches are currently exploring ways to implement its ideals through revisions of domestic policies.[150]

III. PROBLEMS REGARDING TRIBAL JURISDICTION CREATED BY THE CURRENT STATE OF FEDERAL INDIAN POLICY, WHICH DOES NOT FULLY RECOGNIZE TRIBAL SOVEREIGNTY

The TLOA's full impact on reservation criminal justice is yet to be realized, but it is already apparent that the TLOA cannot remedy the most serious problems of reservation crime. The TLOA only takes a small step towards restoring full tribal sovereignty over on-reservation criminal activities, and tribes face multiple barriers in implementing the TLOA's provisions. Furthermore, the continued force of the MCA leads to problems in the federal court system in defining whether a criminal defendant is Indian, which results in a waste of judicial resources in appeals over that issue.

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146. *See infra* notes 148–149.

147. *See* Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010); *see also Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. MISSION TO THE UNITED NATIONS, http://usun.state.gov/documents/organization/153239.pdf (last visited Feb. 25, 2012).

148. UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx.

149. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts 3–4, 18, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

150. For example, the Senate Committee on Indian Affairs held a hearing titled "Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples" on June 9, 2011, asking for input from Indian law experts and tribal leaders about how to begin implementing the tenets of the UN Declaration. *See* "U.S. SENATE COMMITTEE ON INDIAN AFFAIRS, HEARINGS AND MEETINGS: OVERSIGHT HEARING ON SETTING THE STANDARD: DOMESTIC POLICY IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (June 9, 2011)," *available at* http://www.indian.senate.gov/hearings/hearing.cfm?hearingID=e655f9e2809e5476862f735da16ddd16.

A. The TLOA Does Not Restore Tribal Sovereignty over Prosecution of Reservation Crime

Although the TLOA returns some power to tribal courts in the form of sentencing reform, it does not restore tribal courts' ability to prosecute and effectively sentence all crimes committed on reservation territory.[151] Each tribe should have the opportunity to exercise its full self-government and self-determination rights by deciding for itself how to handle on-reservation crime. As long as federal jurisdiction over on-reservation crimes exists, an essentially local community problem will continue to be regulated by a body of law from outside the community. Professor Kevin Washburn argues that, "[i]n essence, criminal laws codify the moral foundations of the community. Criminal law is, in that sense, critical to community identity."[152] One federal judge even remarked:

> I did not realize, prior to taking office as an Article III judge, that I would be presiding over drunk driving cases . . . . Congress has seen fit to impose altogether different penalties on Native Americans driving under the influence in Indian Country as compared with those who drive under the influence elsewhere . . . . Why Congress would have done this is beyond me.[153]

The TLOA also failed to include an "*Oliphant* fix," which would restore tribal jurisdiction over all persons who commit crimes within tribal territory. This is a necessary step towards comprehensively solving problems of on-reservation crime, as will be discussed further in Part IV.

B. The MCA Has Not Solved the Problem of On-Reservation Crime, and the TLOA Does Not Fix the MCA's Weaknesses

Although the MCA has provided the federal government the opportunity to prosecute major reservation crimes for over one hundred years, crime rates on reservations are still astronomically high.[154]

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151. *See supra* Part II.

152. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. REV. 779, 834 (2006).

153. United States v. Swift Hawk, 125 F. Supp. 2d 384, 384–85 (D.S.D. 2000).

154. *See supra* notes 155–158 and accompanying text.

U.S. attorneys have declined to prosecute sixty-five percent of criminal cases on reservations.[155] Violent crime rates on reservations are often more than twice the national average.[156] As an illustration, on a single day in 2009 at northern Minnesota's Red Lake reservation, law enforcement investigated a suicide, three stabbings, two shootings, and multiple domestic violence incidents.[157] Similar stories exist at reservations across the nation.[158]

Another of the most serious categories of problems reservations face are related to illegal drugs. Drug crimes are not covered by the MCA, and tribes can still only sentence drug offenders to a maximum of three years per offense, with a cap at nine years.[159] Additionally, drug offenders are not considered violent criminals under the Bureau of Prisons pilot program,[160] and tribal jails may not be equipped to handle long-term incarceration of drug offenders due to the cost of maintaining appropriate jail facilities.[161]

C. Barriers to Implementing the TLOA at the Tribal Level

Many tribes face costly barriers to implementing the TLOA reforms precisely because the statute amended the ICRA. Some tribal constitutions adopted verbatim the language of the ICRA from 1968.[162] Because the TLOA revised the ICRA's limitations on tribal court systems, these tribes now would need to amend their constitutions to implement the TLOA's positive changes. For example, the Grand Traverse Band of Ottawa and Chippewa Indians (GTB) specifically incorporated the 1968 version of the ICRA's tribal court sentencing limitations of a maximum of one year in jail and/or a

155. Michael Riley, *Promises, Justice Broken*, THE DENVER POST, Nov. 21, 2007, http://www.denverpost.com/ci_7429560.

156. *Rise in Violent Crime on Indian Reservations Prompts New US Effort*, THE GUARDIAN, Aug. 20, 2009, http://www.guardian.co.uk/world/2009/aug/20/native-americans-violence.

157. *Id.* The 2000 Census reported the population of Red Lake Reservation to be only 5,162. *See* THE ANNIE E. CASEY FOUND., *2000 Census Data-Key Facts for Red Lake Reservation, MN*, KIDS COUNT CENSUS DATA ONLINE, http://www.kidscount.org/cgi-bin/aeccensus.cgi?action=profileresults&area=2753512A&areaparent=27S (last visited Feb. 21, 2012).

158. *See, e.g.*, Michael Riley, *Justice: Inaction's Fatal Price*, THE DENVER POST, Nov. 12, 2007, http://www.denverpost.com/ci_7437278 (discussing crime on the Blackfeet and Navajo reservations); Lindsay Whitehurst, *Crime in Indian Country: A Cloudy Image Grows Clearer*, SALT LAKE TRIBUNE, (Nov. 9, 2010).

159. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, sec. 234, § 1302, 124 Stat. 2258, 2279–82 (codified as amended in scattered sections of 25 U.S.C.).

160. *See Tribal Law and Order Act Pilot*, BUREAU OF PRISONS, http://www.bop.gov/inmate_programs/docs/tloa.pdf (last visited Feb. 25, 2012).

161. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 Regent U. L. Rev. 139, 174 (2010).

162. *See supra* notes 163–166 and accompanying text.

$5000 fine into its constitution.[163] In order to adopt the new sentencing limitations created by the TLOA, GTB must amend its constitution through an election called by the Secretary of the Interior, who will order a special election upon request from the Tribal Council or upon receipt of a petition signed by at least 30% of GTB qualified voters.[164] Once the election is approved by the Secretary, at least 30% of GTB eligible voters must vote in the election for it to be valid, and the constitutional amendment can only be adopted if a majority of voters approve the change.[165] This process can be costly and lengthy, and several other tribes will need to undergo similar constitutional revisions before they can enact the TLOA's changes.[166]

Additionally, tribal justice systems already have limited financial resources to hire staff, prosecutors, and public defenders,[167] and the TLOA does not allocate much money to support these systems. For example, the Department of Justice awarded $118,395,208 to 147 tribes and tribal organizations for the 2011 fiscal year for improving tribal justice systems and crime prevention programs, with some tribes receiving less than $100,000.[168] The TLOA also does not provide for a specific liaison between tribes and federal prosecutors to help coordinate administration of justice for on-reservation crime; it remains unclear who will coordinate and how they are expected to undertake this effort.

Finally, the TLOA's requirement that the Attorney General and Secretary of the Interior submit a report in 2014 regarding whether improved tribal sentencing authority should continue is completely inconsistent with a pro-tribal sovereignty approach to the federal-tribal relationship. The results of this report could effectively allow the Secretary to strip tribal courts of their authority within four years of the TLOA going into effect.

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163. CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, art. X, § 1(g).

164. *See id.* art. XV, § 2.

165. *See id.* art. XV, § 1.

166. *See, e.g.*, CONSTITUTION OF THE KICKAPOO TRADITIONAL TRIBE OF TEXAS, arts. X § 2(g), XII; CONSTITUTION OF THE LITTLE RIVER BAND OF INDIANS OF MANISTEE, MICHIGAN, arts. III § 1(g), XIV.

167. Oral Testimony of Elbridge Coochise before the House Interior, Environment and Related Agencies Appropriations Subcommittee for the Fiscal Year 2012 (May 3, 2011), *available at* http://www.naicja.org/storage/HINT%20650-%20Independent%20Review%20Team.pdf.

168. *Coordinated Tribal Assistance Solicitation—FY 11 Combined Award List*, DEP'T OF JUST., http://www.justice.gov/tribal/docs/ctas-award-list.pdf (last visited Feb. 25, 2012).

D. Failure to Define "Indian" Under the MCA Leads to Unequal Application of Justice and Wastes Federal Judicial Resources

The MCA does not adequately define who is an Indian, and Congress has offered little clarification. As a result, defendants charged under the MCA often challenge their convictions by arguing that they are not Indian. In *United States v. Rogers*,[169] the Supreme Court developed a two-prong test to decide whether a person is an Indian: whether (a) the person has "Indian blood," or (b) the person is considered an Indian by a federally recognized Indian tribe or by the federal government.[170] The second part of this test involves examination of a number of factors, and courts throughout the country do not use uniform formulae to determine Indian status under the test's second prong.

Part of the problem for courts in legally defining Indian status stems from the fact that the Indians chapter of the U.S. Code defines Indian by referring back to the MCA, which does not define the term. 25 U.S.C. § 1301 states: " 'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[171] Moreover, Congress adopted alternative definitions of Indian elsewhere in the U.S. Code. For example, the Indian Child Welfare Act (ICWA) defines Indian as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation."[172] Additionally, the Indian Reorganization Act (IRA) defines Indians as

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[173]

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169. 45 U.S. 567 (1846).

170. *See id.* at 572–73.

171. 25 U.S.C. § 1301(4) (2006). 18 U.S.C. § 1153 refers to the Major Crimes Act (MCA).

172. 25 U.S.C. § 1903(3). *See also* 25 U.S.C. § 1903(8) (2006) (defining "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43.").

173. 25 U.S.C. § 479. The section also defines the term "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*

These definitions are similar but not identical, due to the racial blood component of the IRA definition. As a result, a person could be Indian under the IRA's definition, but not Indian under the ICWA.

Despite the passage of the TLOA, Congress has not updated the MCA to define "Indian." A number of court cases have been decided in which defendants challenged their MCA convictions based on their alleged lack of Indian status.[174] As shown above, courts also inconsistently apply the two-prong *Rogers* test when determining whether a person is Indian.

Inconsistent application of the *Rogers* test led to confusion within circuit courts and a split among the federal circuit courts.[175] In the Ninth Circuit, courts are required to consider whether the person is an enrolled member of a recognized tribe, is receiving benefits reserved only for Indians from a tribe or the federal government, is subject to tribal court jurisdiction, and is socially recognized as an Indian.[176] The Ninth Circuit's test leads to unpredictability for defendants charged under the MCA because it does not explain how to give proper weight to each of these factors. In *Maggi*, the Ninth Circuit found that a man with about four percent Indian blood, from a non-recognized tribe, who occasionally took part in cultural activities and utilized Indian Health Services, was not an Indian, and vacated his conviction.[177] In *United States v. Cruz*,[178] the Ninth Circuit determined that a criminal defendant with a combined Indian blood quantum of about 45% with no cultural ties to a tribe, was not an Indian for purposes of the MCA.[179] Conversely, the court decided in *Bruce* that a criminal defendant was Indian because she had about 13% Indian blood, was born on a reservation, and had social and cultural ties to tribe.[180] These three cases illustrate the

174. See, *e.g.*, United States v. Maggi, 598 F.3d 1073, 1075 (9th Cir. 2010); United States v. Stymiest, 581 F.3d 759, 762–63 (8th Cir. 2009); United States v. Bruce, 394 F.3d 1215, 1217–18 (9th Cir. 2005).

175. The Ninth Circuit has inconsistently applied the Rogers test within its own cases, while the Eight Circuit also employs the same Rogers test and reaches different results in cases with facts very similar to Ninth Circuit cases. *See, e.g.*, *Maggi*, 598 F.3d at 1077–83 (9th Cir. 2010); *Stymiest*, 581 F.3d at 763–64 (8th Cir. 2009); *Bruce*, 394 F.3d at 1223–27 (9th Cir. 2005).

176. *See Bruce*, 394 F.3d at 1226–27. *St. Cloud v. United States* proposed the test that the Ninth Circuit formally adopted in *Bruce*. *St. Cloud*, 702 F. Supp. 1456, 1460–62 (D.S.D. 1988). The 8th Circuit also cited *St. Cloud* in *Stymiest*, but has not formally adopted the test. *See Stymiest*, 581 F.3d at 760–62.

177. 598 F.3d at 1076.

178. 554 F.3d 840 (9th Cir. 2009).

179. *See id.* at 851.

180. *See* 394 F.3d at 1224–25.

inconsistencies that result from the Ninth Circuit's multi-factor Indian test.

In *Stymiest*, the Eighth Circuit recently applied the same Indian test as the Ninth Circuit.[181] Even though the defendant had a very similar background and blood quantum to the defendant in *Cruz*, the court found him to be an Indian for purposes of the MCA.[182] The court did not address how much Indian blood Stymiest actually had, but assumed that Stymiest did have "the requisite Indian blood—his grandfather is an enrolled member and medicine man in a Minnesota Band."[183] The court also found that Stymiest received treatment from Indian Health Service, submitted himself to tribal court proceedings, and told others that he was an Indian.[184] According to the court, the combination of these factors provided the jury with enough evidence to determine that Stymiest was an Indian.[185]

The above cases illustrate that the existence of the MCA wastes federal resources at the trial and appellate courts. During the past decade, many MCA convictions have resulted in appeals to the U.S. circuit courts.[186] During the first half of 2011, the Ninth Circuit alone heard at least two appeals based on a defendant's Indian status under the MCA.[187]

Moreover, these circuit court cases ignore other Supreme Court jurisprudence establishing two separate forms of Indian status. The first form is a person's political status as an Indian, which results from a person's enrollment in an Indian tribe that is recognized as a sovereign entity by the federal government.[188] The second form is a person's racial status, which is based on the amount of Indian blood a person possesses; this number is also known as a person's "blood quantum."[189] For example, the child of a fully Indian person (100% blood quantum) and a fully non-Indian person would have a 50% blood quantum. These two statuses often overlap because, for enrollment, most tribes require either a minimum percentage

181. *See Stymiest*, 581 F.3d at 762.

182. *See id.* at 766.

183. *See id.*

184. *See id.*

185. *See id.* Courts have determined that the question of whether a defendant is Indian for purposes of the MCA is a question of fact for the jury. *See Bruce*, 394 F.3d at 1227 ("Bruce met her burden of producing sufficient evidence upon which a jury might rationally conclude that she was an Indian.").

186. *See, e.g, Cruz*, *Stymiest, Maggi*, *supra* notes 175, 178.

187. *See* United States v. Labuff, 658 F.3d 873, 875 (9th Cir. 2011); United States v. Smith, 442 F. App'x 282–83 (9th Cir. 2011).

188. *See* Morton v. Mancari, 417 U.S. 535, 552–54 (1974).

189. *See id.*; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 9–11 (5th ed. 2009).

of Indian blood or a direct familial link to a known tribal member.[190] A person meeting a tribe's blood quantum requirement would be enrolled as a tribal member and gain federally recognized political status as an Indian.

Since federal district courts place inconsistent weight on a defendant's political and racial Indian status,[191] the *Rogers* test creates equal protection problems. For example, if an Indian man rapes a non-Indian woman on a reservation, he is subject to both federal court jurisdiction pursuant to the MCA and to tribal court jurisdiction.[192] If he is found guilty in federal court, he is sentenced according to federal court sentencing guidelines. If a non-Indian man rapes a non-Indian woman on a reservation, however, that man is only subject to state criminal jurisdiction and state sentencing guidelines, as rape is not a federal crime.[193] In many cases, federal sentencing guidelines are harsher than state guidelines.[194] Therefore, an Indian defendant may be subject to harsher punishment than a non-Indian defendant for the same crime.[195] Because "Indian" is such an unpredictable category under the MCA, there are cases where defendants are found to be Indian based solely on their racial status, and are therefore subject to different punishments just because of their race.

IV. PROPOSED REFORMS

Congress should incrementally repeal the MCA and revise the TLOA to allow tribes to re-assert jurisdiction over all crimes committed by any person within their reservation boundaries. These steps would restore sovereignty to tribes that want exclusive jurisdiction over all criminals within their boundaries and have the resources necessary to deal with on-reservation crime. An opt-in repeal of the MCA accompanied by revision to the TLOA would also promote tribal sovereignty because it would allow tribes to choose whether they want to reclaim criminal jurisdiction.

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190. For a detailed analysis of the variety of ways to define Indian status under current law, *see* Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2001).

191. *See supra* notes 174–176.

192. 18 U.S.C. § 1153 (2006).

193. *See Oliphant*, 435 U.S. at 208.

194. See Timothy J. Droske, Correcting Native American Sentencing Disparity Post-Booker, 91 MARQ. L. REV. 723, 724–25 (2008); Charles B. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 FED. SENT'G. REP., 71–72 (2000).

195. *See* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post*-Booker, 91 MARQ. L. REV. 723, 724–25 (2008).

A. Revise the MCA

To solve the problems associated with the MCA, Congress should revise the statute with the intent of eventually abolishing it. Congress's main purpose in enacting the MCA was to bring the rule of law to "lawless tribes" and to assimilate Indians into American society, as illustrated by the reactionary enactment of the law following the *Crow Dog* case.[196] As assimilation is no longer a valid or official federal policy,[197] the continued existence of the MCA is a historical blemish that prevents Indian tribes from fully realizing their inherent sovereignty. The MCA should eventually be repealed, but not until all tribes are able to handle the influx of criminal cases that would appear in tribal courts. Until then, the MCA can be revised so that it is less harmful to tribal sovereignty.

First, Congress should adopt a definition of "Indian" within the MCA. Under this definition, an Indian for the purposes of criminal jurisdiction should be an enrolled tribal member of a federally or state-recognized tribe. This definition will create more uniformity across the nation in determining whether a person is Indian, because a court's inquiry will be limited to the clearer question of whether a defendant is a tribal member. This definition would also return sovereign power to tribes to determine who is an Indian, as the tribe's requirements for enrollment will effectively be the statutory basis for determining whether a person is Indian. Finally, this definition will eliminate disparate sentencing for the same crimes in cases where someone is found to be Indian based solely on their racial characteristics; instead of emphasizing a person's racial status, the new definition would focus on a person's political status.

Congress should also revise the MCA to allow tribes to opt out of its provisions. This would allow tribes to choose for themselves whether and when to reassert exclusive jurisdiction over major reservation crimes. Similarly, Congress should allow a similar opt-out provision for the General Crimes Act.[198] If all tribes eventually choose to opt-out of the MCA and the General Crimes Act, both should be abolished. However, these opt-out provisions will only be effective if tribal courts regain the power to effectively sentence criminal perpetrators, which requires further revisions to the TLOA.

196. *See supra* Part I-A.
197. *See supra* Part II.
198. *See supra* note 119.

B. Revise the TLOA

Like revisions to the MCA, any revisions to the TLOA should fully support a tribe's choice to determine how to administer justice within its territory. The following proposed revisions would allow tribes to opt-in to the implementation of the revision. Moreover, any revisions should be adopted as stand-alone statutes rather than as amendments to the ICRA, so that tribes may adopt the provisions without the additional burden of amending their constitutions.

First, Congress should remove the sentencing cap imposed on tribal courts by the TLOA and other statutes. This would allow tribal governments to establish their own sentencing guidelines for their courts and would help make tribal courts more effective in cases where they have exclusive jurisdiction (i.e., if the tribe has opted out of the MCA, or if other federal criminal charges do not apply to the crime). Additionally, tribes could then enact a one-time constitutional amendment that would permanently remove sentencing caps from their constitutions, making later revisions and adjustments to tribal court sentencing authority more efficient by making them statutory rather than constitutional.

Congress should also add an "*Oliphant* fix," which would restore jurisdiction to the tribes over all persons committing crimes on their reservations, regardless of political or racial status. This would eliminate the need to establish a defendant's background as a basis for jurisdiction. It would also restore tribes' inherent sovereign power to address all crimes committed within their territory. Several scholars and Indian leaders have argued for this change since the decision in *Oliphant*, because this change would close a major loophole in reservation criminal jurisdiction.[199] Although the proposed "SAVE Native Women Act" is a positive step towards remedying the harms of *Oliphant*, because it would allow tribal jurisdiction over most domestic violence cases, it does not fully restore inherent tribal jurisdiction and will therefore have a limited impact on overall reservation crime.[200] Additionally, the recent

199. *See generally*, Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009); Marie Quasius, *Native American Rape Victims: Desperately Seeking an* Oliphant *Fix*, 93 MINN. L. REV. 1902 (2009).

200. The SAVE Act limits the expansion of tribal jurisdiction to crimes involving dating or domestic violence. *See* SAVE Native Women Act, S. 1763, 112th Cong. §§ 204(a)–204(d) (2011). Therefore, if a native woman is a victim of violence committed on a reservation by a non-Indian with whom she is not in a relationship, the tribe will not have jurisdiction. Additionally, the SAVE Act allows non-Indian defendants to petition to remove their case from tribal jurisdiction if their victim is non-Indian, or if the tribe cannot prove that the victim is

Senate reauthorization of the Violence Against Women Act (VAWA) would implement the same jurisdictional changes as the proposed SAVE Act (using nearly identical language),[201] but like the SAVE Act, the VAWA provisions will likely be insufficient in solving reservation crime problems.[202]

If Congress adopts the changes proposed in this Note and tribes opt-in to the changes, jurisdiction for crimes committed in Indian Country would always fall exclusively under tribal jurisdiction. These proposed changes would eliminate the complicated jurisdictional rules illustrated by the table in Part I. Instead, a uniform system would exist that would primarily rely on geographic boundaries, rather than political or racial status. To implement these proposals, Congress will need to amend existing statutes (MCA, TLOA, and ICRA) to remove the provisions mentioned in this section that are most problematic for tribes. After this step, Congress would be able to create a new, comprehensive statute to restore all criminal jurisdiction to tribes and lay out all requirements for opting in to the new system. Then, any subsequent changes that need to be made could be implemented in one place, eliminating the need for statutory cross-references.

C. Potential Criticisms of Proposed Reforms

Many of the critiques of expanding tribal jurisdiction relate to concerns that tribes are unable to manage all reservation crime, prosecution, and punishment due to a lack of resources,[203] or that it would somehow be unfair to subject non-Indian defendants to tribal court jurisdiction.[204]

Indian. *See id.* Senator Daniel Akaka noted that the SAVE Act would allow tribes to exercise concurrent criminal jurisdiction over all persons committing acts of domestic violence on Indian reservations, by nature of tribes' inherent "power of self-government." 157 CONG. REC. S6919–20 (daily ed. Oct. 31, 2011) (statement of Sen. Daniel Akaka).

201. Violence Against Women Reauthorization Act of 2011, 112th Cong. S. 1925 § 904 (passed by the Senate on April 26, 2012).

202. *See infra* note 200.

203. Testimony of Elbridge Coochise before the House Interior Environment and Related Agencies Appropriations Subcommitte for the Fiscal Year 2012 (May 3, 2011), *available at* http://www.naicja.org/storage/HINT%20650-%20Independent%20Review% 20Team.pdf.

204. DAVID MUHLHAUSEN AND CHRISTINA VILLEGAS, VIOLENCE AGAINST WOMEN ACT: REAUTHORIZATION FUNDAMENTALLY FLAWED (March 29, 2012), *available at* http://www.heritage.org/research/reports/2012/03/the-violence-against-women-act-reauthorization-fundamentally-flawed (asserting that a proposal to return criminal jurisdiction to Indian tribes is "unprecedented, unnecessary, and dangerous" because "tribal courts do not necessarily adhere to the same constitutional provisions that protect the rights of all defendants in federal and state courts.").

It is possible that some tribal courts and tribal jails may not well equipped to handle an increase in the number of cases and perpetrators due to increased financial costs.[205] However, making tribal court jurisdiction an opt-in choice for the tribe can help solve this issue, because tribes will presumably not attempt to take over jurisdiction if they do not have the resources to do so. Additionally, tribes and states could consider entering into agreements to share jail resources. A variety of federal grants are available to support tribal justice programs,[206] and the TLOA also created a pilot program for using federal prisons as housing for defendants sentenced in tribal court.[207] Under the pilot program, however, the Bureau of Prisons can only incarcerate up to one hundred tribal members convicted of violent crimes (as defined by the MCA) who are sentenced to two or more years of imprisonment by a tribal court.[208] These limits on the pilot program make it minimally useful to tribes, and should be lifted.

Additionally, many express concern about subjecting non-Indians to Indian courts and sentencing systems. First, the composition of reservation juries may present equal protection problems, because often only tribal members serve on tribal court juries.[209] To address this concern, tribes could consider expanding their jury selection beyond tribal members and make all persons living within reservations boundaries eligible for jury selection. Moreover, tribal courts may actually protect defendants more from "arbitrary prosecutorial power" than state courts, as all judicial proceedings for crimes punishable by imprisonment are guaranteed a jury trial.[210] Second, some express concern about subjecting non-Indians to the strangeness, unfamiliarity, or potential bias of tribal courts.[211] This

205. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 174 (2010).

206. *See Improving Criminal Courts FY 2011 Competitive Grant Announcement*, DEP'T OF JUST., http://www.ojp.usdoj.gov/BJA/grant/11CrimCourtsSol.pdf (last visited Feb. 25, 2012); Greg Guedel, *DOJ Grants Available for Tribal Justice Programs*, NATIVE LEGAL UPDATE BLOG (Mar. 21, 2011), http://www.nativelegalupdate.com/2011/03/articles/doj-grants-available-for-tribal-justice-programs.

207. *See Tribal Law and Order Act Pilot*, BUREAU OF PRISONS, http://www.bop.gov/inmate_programs/docs/tloa.pdf (last visited Feb. 25, 2012).

208. *See id.*

209. Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 16 (2008)

210. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ.. ST. L. J. 403, 429 (2004) (contrasting state and tribal court "right to trial by jury," noting that state courts are only required to give a defendant a jury trial if he is charged with a felony or misdemeanor punishable by imprisonment of at least six months).

211. Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CA. L. REV. 1165, 1191 (2010); Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L. J. 1047, 1050–51 (2005).

argument is no different from arguing that a person from Michigan should not be subject to a California court's jurisdiction because he is unfamiliar with the court procedures. Like state laws and procedures, many tribal law and court procedures are clear—tribes often codify them either in a tribal code or in judicial opinions.[212]

Finally, the geographic approach to tribal court jurisdiction will not always be entirely clear due to complex reservation boundaries. As mentioned above,[213] the early 20th century allotment policy created reservations with pockets of land held in fee by non-Indians. Because of complicated court decisions, the jurisdiction to which these lands are subject is not always clear. Congress could address these problems on a case-by-case basis, helping tribes better define their boundaries at the time they reassert jurisdiction.

D. One Tribal Court Success Story

In 2001, the Tulalip tribes of Washington received approval to begin handling minor criminal cases.[214] Prior to that date, the state of Washington prosecuted most reservation crime.[215] The Tulalip court employs a variety of tools to combat reservation crime, including a Juvenile Diversion Panel, which aims to change nonviolent Tulalip youth offenders into positive and productive members of the community,[216] and a Wellness Court, which helps drug offenders rehabilitate themselves in order to avoid jail time.[217] Since 2002, the Tulalip have experienced a significant drop in reservation crime rates, including a 9% drop in criminal case filings during 2010, despite an increase in the number of adult enrolled

212. *See, e.g.*, NAV. R. CR. P., *available at* http://www.navajocourts.org/Rules/criminalpro.htm (last visited Nov. 10, 2011); Tulalip Tribes of Washington Law and Order Code, *available at* http://www.tulaliptribes-nsn.gov/Portals/0/pdf/49_law_and_order.pdf (last visited Nov. 10, 2011).

213. *See supra* Part I-A.

214. WENDY A. CHURCH, RESURRECTION OF THE TULALIP TRIBES' LAW AND JUSTICE SYSTEM AND ITS SOCIO-ECONOMIC IMPACTS 12 (May 21, 2006), *available at* http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/tribal_court/Tulalip-History-of-Law-&-Justice.pdf.

215. *Id.* at 6–7.

216. *Tulalip-Based Juvenile Diversion Panel*, TRIBAL CT.: JUV., http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/JuvenileDiversion.aspx (last visited Feb. 25, 2012).

217. *Tulalip Tribal Wellness Court*, TRIBAL CT.: WELLNESS CT., http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/WellnessCourt.aspx (last visited Feb. 25, 2012). The Tulalip Wellness Court has helped defendants who have successfully completed the rehabilitation and probation program avoid approximately 10,000 jail days, which also helps conserve the tribe's financial resources.

tribal members.[218] The Tulalip Court has also partnered with the University of Washington's Tribal Court Public Defense Clinic to provide low-cost public defender services for tribal court cases.[219] The Tulalip court system illustrates how successful tribes can be when they have control over their own affairs and have the authority to protect their citizens. Congress should re-affirm its commitment to tribal sovereignty and its rejection of assimilation policies by fully restoring tribes' abilities to choose whether, how, and when they will prosecute crimes impacting their communities.

CONCLUSION

During a November 10, 2011 Senate Committee on Indian Affairs hearing regarding the SAVE Native Women Act, panelist Thomas Heffelfinger relayed a remark from a councilmember of the Coeur D'Alene tribe: "How can tribes have sovereignty when they can't protect their children and their women?"[220] Indian women and children are especially affected by the lack of tribal jurisdiction over reservation crime, but the high crime rates on reservations affect all who live there. Tribes need to be given an opportunity to reassert their sovereign control over all reservation criminal matters in order to protect their communities.

If the federal government intends to comply with its self-stated support of inherent Indian tribal sovereignty, it should restore full power to tribes to prosecute all crimes committed within their territory, regardless of the race or political status of the perpetrator, and it should stop placing arbitrary limits on tribal court sentences. Congress should comprehensively overhaul the major statutes limiting tribal control over reservation crime, including the Major Crimes Act, General Crimes Act, Indian Civil Rights Act, and the Tribal Law and Order Act. A comprehensive approach can simplify the current statutory system and re-establish an aspect of tribal sovereignty that will help tribes protect their reservation communities from crime.

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218. TULALIP TRIBAL COURT, 2010 ANNUAL REPORT, http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/tribal_court/2010_Annual_Report.pdf (last visited Feb. 25, 2012).

219. Wendy Church, *Why Does the Tribe Use the UW Tribal Court Public Defense Clinic?*, SEE-YAHT-SUB, http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/tribal_court/Why-Does-the-Tribe-Use-the-UW-Tribal-Court-Public-Defense-Clinic.pdf (last visited Feb. 25, 2012).

220. *See Stand Against Violence and Empower ("SAVE") Native Women Act: Hearing on S. 1763 Before the S. Comm. on Indian Affairs*, 112th Cong. 1–2 (2011) (statement of Thomas Heffelfinger).