

A CRISIS IN INDIAN COUNTRY: AN ANALYSIS OF THE TRIBAL LAW AND ORDER ACT OF 2010

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ABSTRACT

Crime and violence have long been a serious problem in Indian Country. In recent years, though, the extraordinary levels of gang activity and high rates of sexual violence against Native American women have received a large amount of media attention. Responding to this problem, Congress passed the Tribal Law and Order Act of 2010 (“TLOA” or “the Act”). Through this legislation, Congress seeks to lower the rates of crime in Indian Country, particularly with regard to crimes committed against Native American women; the Act significantly increases the resources and authority of federal prosecutors and agencies in Indian Country and increases the sentencing authority of tribal courts.

This Article considers the major provisions of this landmark Act and concludes that it is an important piece of legislation that could potentially have profound effects in many parts of Indian Country. Although the Act was widely supported, however, this Article argues it does not do enough and is instead only a short-term remedy to the problems facing Indian Country. The Article proposes several pieces of legislation that would provide long-term solutions, including increasing the sentencing authority of tribal courts and legislatively overturning the jurisdictional limitations imposed on tribal courts by the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*. Both of these major reforms could be used as tools to increase the status and skill of tribal courts, eventually making them a much more equal third sovereign.

INTRODUCTION

Twenty-four-year-old Richard Wilson has been a pallbearer at the funerals of five of his fellow members of the North Side Tre Tre Gangster Crips. Most of the gang members were only teenagers when they died, often victims of senseless violence.¹ Richard Wilson, though, is not a

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¹ Erik Eckholm, *Gang Violence Grows on an Indian Reservation*, N.Y. TIMES, Dec. 14, 2009, at A14.

gang member in the Nickerson Gardens neighborhood of Los Angeles or on the south side of Chicago; instead, he is one of an estimated 5,000 Native American² gang members living on Pine Ridge Indian Reservation in rural South Dakota, home to the Oglala Sioux tribe.³ The Pine Ridge Reservation is not alone in struggling to deal with rising gang violence. Unfortunately, gangs are becoming increasingly common throughout the largely rural landscapes of “Indian Country.”⁴

The high levels of gang and domestic violence in Indian Country⁵ are topics receiving an unusually large amount of attention recently, both in Washington and in the mass media.⁶ For example, Attorney General Eric Holder recently stated that “in many parts of the Indian country, the situation is dire. Violent crime has reached crisis proportions on many reservations.”⁷ In response to the current epidemic of violence in Indian Country, the Tribal Law and Order Act of 2010 was recently passed by both Houses of Congress and signed into law by President Obama.⁸ A previous version of the bill was introduced in both

² This Article uses the term “Indian” and “Native American” interchangeably and no particular distinction is intended.

³ Eckholm, *supra* note 1.

⁴ Mary Annette Pember, *Gangs in Indian Country*, DAILY YONDER (Sept. 17, 2009), <http://www.dailyyonder.com/gangs-indian-country/2009/09/17/2350>.

⁵ “Indian country” is defined in 18 U.S.C. § 1151 as including (1) land within Indian reservations, (2) dependent Indian communities, and (3) Indian allotments. 18 U.S.C. § 1151 (2006).

⁶ Gavin Clarkson, Op-Ed., *Beyond the Law*, L.A. TIMES, Aug. 3, 2007, at A27; Eckholm, *supra* note 1; Michael Riley, *Principles, Politics Collide*, DENV. POST, Nov. 13, 2007, at A01; Carson Walker, *Feds See ‘Proliferation’ of Indian Gang Activities*, INDIAN COUNTRY TODAY, July 17, 2009, available at <http://www.indiancountrytoday.com/national/plains/51025707.html>; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, to United States Attorneys with Districts Containing Indian Country (Jan. 11, 2010), available at <http://www.justice.gov/dag/dag-memo-indian-country.html>; *All Things Considered: Rape Cases on Indian Land Go Uninvestigated* (NPR radio broadcast July 25, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=12203114>; *Gangland: The Wild Boyz* (History Channel television broadcast June 4, 2010) (a documentary about the Wild Boyz gang, a gang that is comprised primarily of Oglala Sioux); *Tell Me More: Gang Violence on the Rise on Indian Reservations* (NPR radio broadcast Aug. 25, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=112200614>; *Weekend Edition: Lawmakers Move to Curb Rape on Native Lands* (NPR radio broadcast May 3, 2009), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=103717296>.

⁷ *Oversight of the [U.S.] Dep’t of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2009) [hereinafter *Oversight of the U.S. Dep’t of Justice*] (statement of Eric H. Holder, Jr., Att’y Gen. of the United States).

⁸ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.); see also Gale Courey Toensing, *Obama Signs ‘Historic’ Tribal Law and Order Act*, INDIAN COUNTRY TODAY, July 30, 2010, available at <http://www.indiancountrytoday.com/home/content/Obama-signs-historic-Tribal-Law-and-Order-Act-99620099.html>.

houses of Congress in 2008, but it expired upon the ending of the 110th Congress.⁹ The TLOA received strong bipartisan support, and the Act addresses a number of different issues related to crime in Indian Country.¹⁰ Its primary goals include strengthening tribal law enforcement agencies, increasing the coordination between tribal and federal law enforcement efforts, and increasing federal accountability in Indian Country.¹¹ Of particular note, the TLOA amends the Indian Civil Rights Act (“ICRA”) to increase the sentencing authority of tribal courts to three years’ imprisonment,¹² provides for concurrent federal jurisdiction in Public Law-280 states upon tribal consent,¹³ and begins to address the unbelievably large number of crimes committed against Native American women.¹⁴

Even though the TLOA has the potential to significantly increase the level of law enforcement in Indian Country, it is not a perfect solution. Rather, as much of the Act focuses on increasing federal involvement in Indian Country, it is only a short-term fix. In this regard, the TLOA does not entirely retool criminal law in Indian Country; instead, it addresses particular areas of concern and attempts to develop short-term solutions to them. The TLOA places a federal band-aid over the current crime crisis, but it currently does not do enough to foster long-term solutions to the problems. If the level of crime in Indian Country is to be reduced permanently, Congress will need to use the TLOA as a building block for future legislation that will more fundamentally overhaul criminal law in Indian Country. Ideally, future legislation would ensure that tribal law enforcement agencies and courts are adequately funded, further increase the sentencing authority of tribal courts beyond the proposed three-year limit, and legislatively overturn *Oliphant*¹⁵ to provide for tribal jurisdiction over non-Indians who commit crimes in Indian Country.

Section I of this Article discusses the current crime crisis in Indian Country, particularly gang-related and domestic violence; it also discusses some of the causes of the high rates of crime, focusing on the patchwork of criminal jurisdiction and the insufficient funding of tribal

⁹ S. 3320, 110th Cong. (2008); H.R. 6583, 110th Cong. (2008); Rob Capriccioso, *Major Legislation Introduced to Combat Crime*, INDIAN COUNTRY TODAY, Apr. 15, 2009, available at <http://www.indiancountrytoday.com/home/content/42801187.html>.

¹⁰ Capriccioso, *supra* note 9.

¹¹ Press Release, Senate Comm. on Indian Affairs, Legislation Gives Boost to Law and Order in Indian Country (July 23, 2008), available at <http://indian.senate.gov/news/pressreleases/2008-07-23.cfm?renderforprint=1&>.

¹² Tribal Law and Order Act § 234(a)(3).

¹³ *Id.* § 221.

¹⁴ *Id.* §§ 261–266.

¹⁵ 435 U.S. 191 (1978).

law enforcement. Section II discusses the TLOA in detail, analyzing and considering the major provisions of the Act. Finally, Section III considers some of the shortcomings of the TLOA and proposes future legislation that would build upon and correct portions of the TLOA.

I. VIOLENCE ON INDIAN RESERVATIONS

A. *The Crime Problem in Indian Country*

Although media outlets, Congress, and the Department of Justice (“DOJ”) have recently focused attention on the epidemic of gang and domestic violence, high levels of crime, particularly domestic violence and sexual assault,¹⁶ are nothing new in Indian Country. For example, in 1975 a “Task Force on Indian Matters” was formed in the DOJ to respond to high levels of crime among Native Americans.¹⁷ The Task Force’s report concluded that “[l]aw enforcement on most Indian reservations is in serious trouble.”¹⁸ The report noted that inadequate funding and training of law enforcement, confusing overlapping jurisdictional provisions, and a lack of centralized control in the Bureau of Indian Affairs (“BIA”) were partially to blame for a crime rate that was fifty percent higher on Indian reservations than in other rural parts of America.¹⁹ In 1997, a Report of the Executive Committee for Indian Country Law Enforcement Improvements opened by stating that “[t]here is a public safety crisis in Indian Country” and proceeded to detail the extraordinarily high crime rate in Indian Country.²⁰ Similarly, although generally considered a failed policy,²¹ Public Law 280 was enacted in

¹⁶ See, e.g., Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457–59 (2005) (describing the history of rape of Native American women).

¹⁷ See generally DORIS MEISSNER, U.S. DEP’T OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS (1975).

¹⁸ *Id.* at 77.

¹⁹ *Id.* at 24–26.

²⁰ CRIMINAL DIV., U.S. DEP’T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), available at <http://www.justice.gov/otj/icredact.htm>.

²¹ See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 538 (1975); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1441 (1997). In fact, Congress amended Public Law 280 just fifteen years later, making tribal consent via referendum mandatory before states could assume jurisdiction. See 25 U.S.C. § 1326 (2006). No tribe has consented to state jurisdiction since the amendment in 1968. Goldberg-Ambrose, *supra*, at 1408.

1953 by Congress²² in an attempt to help remedy a perceived breakdown in law enforcement and public order in Indian Country.²³

The violent crime rates in Indian Country are most troubling when compared to the rates nationwide, which have fallen over the past decade.²⁴ It has been estimated that since the 1990s,²⁵ Native Americans have been victims of violent crime at a rate at least double that of any other demographic in the United States.²⁶ Even more startling is the fact that approximately one-third of Native American women will be the victim of rape in their lifetime.²⁷ Recent statistics also show that in at least eighty-six percent of cases of rape or sexual assault, the offender is non-Indian,²⁸ and in approximately two-thirds of violent crimes generally, the offender is described as non-Indian.²⁹ These statistics suggest that not only are Native Americans the victims of a disproportionately high number of crimes, but that many non-Indians

²² Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C., and 28 U.S.C.).

²³ Goldberg-Ambrose, *supra* note 21, at 1406 (quoting *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379 (1976)); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632 (1998).

²⁴ See MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 227777, CRIMINAL VICTIMIZATION, 2008 2 (2009); CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 194610, CRIMINAL VICTIMIZATION 2001 1, 2 (2002).

²⁵ STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME 4–5 (2004); CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993–1998 1 (2001); see generally STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 188095, POLICING ON AMERICAN INDIAN RESERVATIONS (2001) (describing the elevated crime rate in Indian Country).

²⁶ MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 197936, TRIBAL LAW ENFORCEMENT, 2000 3 (2003) (“In particular, the rate of aggravated assault among American Indians and Alaska Natives in 2000 was roughly twice that of the country as a whole (600.2 per 100,000 versus 323.6 per 100,000).”).

²⁷ PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000). By comparison, these rates are approximately double the rates for African-American and white women (18.8% and 17.7%, respectively). *Id.*

²⁸ Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the U.S.A.* 4 (2007) (citing PERRY, *supra* note 25, at 9), available at <http://www.amnestyusa.org/women/maze/report.pdf>.

²⁹ PERRY, *supra* note 25, at 9 (“When asked the race of their offender, American Indian victims of violent crime primarily said the offender was white (57%), followed by other race (34%) and black (9%).”).

are taking advantage of the lack of law enforcement in Indian Country to commit acts of violence, such as assault or rape, against Indians.

1. Gang Violence in Indian Country

One type of crime that has garnered a great deal of attention recently is the wave of gang violence that has engulfed much of Indian Country. Although the exact increase and scale of gang activity is impossible to determine, it is a growing problem.³⁰ The Navajo Nation, for example, recently reported that there are over 225 gangs in its territory alone, up from 75 in 1997.³¹ Christopher Grant, the former head of an anti-gang unit in Rapid City, South Dakota, and current consultant on gang prevention, stated that there has been a “marked increase in gang activity, particularly on reservations in the Midwest, the Northwest and the Southwest over the last five to seven years.”³² DOJ studies also suggest that the presence of gangs has increased markedly in Indian Country, especially since the second half of the 1990s.³³ The gangs have proven to be a serious and destructive force in many parts of Indian Country. For example, the previously mentioned Pine Ridge Reservation, home to the Oglala Sioux, reported thousands of gang-related thefts, assaults, property crimes, and several murders from 2006 to 2009.³⁴

Most of the members of these gangs are Native American teenagers.³⁵ The gangs tend to be an extension of many of the underlying problems plaguing Indian communities,³⁶ which include rampant alcoholism,³⁷ drug abuse,³⁸ domestic violence,³⁹ and high levels of suicide

³⁰ ALINE K. MAJOR ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 202714, YOUTH GANGS IN INDIAN COUNTRY 1 (2004).

³¹ Eckholm, *supra* note 1; *Tell Me More*, *supra* note 6.

³² Eckholm, *supra* note 1.

³³ See MAJOR ET AL., *supra* note 30, at 5, 7. By comparison, national samples in the same survey show an increase in gang activity nationally starting in the late 1980s. The explosion of gangs in Indian country seems to be a more recent phenomenon. *Id.* at 7.

³⁴ Eckholm, *supra* note 1.

³⁵ See MAJOR ET AL., *supra* note 30, at 6; ALINE K. MAJOR & ARLEN EGLEY, JR., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, 2000 SURVEY OF YOUTH GANGS IN INDIAN COUNTRY (2002).

³⁶ See MAJOR ET AL., *supra* note 30, at 9, 11, 14.

³⁷ See LAWRENCE A. GREENFELD, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, NCJ 168632, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME (1998); WAKELING ET AL., *supra* note 25, at 19–20 (noting that many crimes in Indian Country are related to alcohol); INDIAN HEALTH SERV., DEP'T OF HEALTH AND HUMAN SERVS., TRENDS IN INDIAN HEALTH, 1998–1999 108 [hereinafter INDIAN HEALTH SERVICE] (finding that the alcoholism death rate among Native Americans from 1994 to 1996 is over seven times the national average for 1995).

and depression.⁴⁰ Additionally, other commonly cited factors for the sudden increase in gangs in Indian communities include the influence of urban gangs from popular culture and the importation of gangs from residents who have moved between jails or cities and Indian Country.⁴¹

These gangs are undoubtedly damaging to life in Indian Country and currently threaten to undermine the health of many tribes. For example, among the Navajo Nation, plummeting rates of affiliation with the Tribe and decreased use of the Navajo language have been connected with gang membership.⁴² Additionally, as gang cultures displace the unique cultures of the various tribes among Indian youth,⁴³ the very existence of some tribes may be threatened in the future decades. Indeed, the “recent surge in gang activity [already] reflects . . . a growing loss of culture and community” among Native American youth.⁴⁴ It is not too late, however; because many of the gangs are a relatively recent phenomenon, it may be easier for law enforcement and other support services to eradicate them before they take permanent root than it is to combat the well-established gangs that exist in many urban areas.⁴⁵

In addition to the crippling effect of domestic gangs, populated mainly by Native American youth, Indian Country has become a target for Mexican gangs who traffick, produce, and sell drugs in the United

³⁸ NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, INDIAN COUNTRY DRUG THREAT ASSESSMENT 8–9 (2008) [hereinafter DRUG THREAT ASSESSMENT 2008].

³⁹ LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, DEP’T OF JUSTICE, NCJ 173386, AMERICAN INDIANS AND CRIME 8 (1999); see also Stéphanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 TRAUMA, VIOLENCE & ABUSE 353, 354 (2004) (collecting statistics about the rates of intimate partner violence in various tribes).

⁴⁰ INDIAN HEALTH SERVICE, *supra* note 37, at 66–68 (finding that the suicide rate among Native Americans aged 5 to 44 from 1994 to 1996 was over twice the national average in 1995).

⁴¹ MAJOR ET AL., *supra* note 30, at 8, 9.

⁴² BARBARA MENDENHALL & TROY ARMSTRONG, CTR. FOR DELINQUENCY & CRIME POLICY STUDIES, NATIVE AMERICAN YOUTH IN GANGS: ACCULTURATION AND IDENTITY 8–9, available at http://www.helpinggangyouth.com/paper_on_indian_gangs-mendenhall.pdf.

⁴³ See Eckholm, *supra* note 1; see also *Examining the Increase of Gang Activity in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 44 (2009) [hereinafter *Oversight Hearings*] (statement of Brian Nissen, Council Member of the Confederated Tribes of the Colville Reservation) (describing the displacement of tribal culture with gang culture among the youth in the Colville Tribe).

⁴⁴ ARTURO HERNANDEZ, EDUC. RES. INFO. CTR., CAN EDUCATION PLAY A ROLE IN THE PREVENTION OF YOUTH GANGS IN INDIAN COUNTRY? ONE TRIBE’S APPROACH 3 (2002), available at <http://www.eric.ed.gov/PDFS/ED471717.pdf>.

⁴⁵ See MAJOR ET AL., *supra* note 30, at 10 (citing JAMES C. HOWELL ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, MODERN-DAY YOUTH GANGS 7 (2002)).

States.⁴⁶ For example, on the Warm Springs Reservation in central Oregon in 2008, state police seized 12,000 adult marijuana plants worth an estimated \$10 million.⁴⁷ Although a large seizure of marijuana is not particularly surprising today, the discovery became startling when it was found that the drugs had been grown and harvested by a Mexican gang that had infiltrated and taken over parts of the reservation.⁴⁸ The Warm Springs Reservation is not alone; rather, illicit marijuana farms controlled by Mexican gangs have been found all across the nation, often operated on reservations.⁴⁹

The infiltration of Mexican gangs into Indian Country has not been limited to drug trafficking. Indian Country has also become home to the highly dangerous gun trafficking trade.⁵⁰ At the Yakama homeland in Washington State, for example, a Mexican gang planted hundreds of acres of marijuana and imported guns into Mexico for use by Los Zetas,⁵¹ a Mexican paramilitary group.⁵² Quite frighteningly, it is believed that Los Zetas are already establishing a presence in Washington Indian Country to protect their marijuana crops.⁵³ Aside from being a threat to the well-being of the Native Americans living in these areas, the penetration of the United States by violent Mexican drug cartels is a serious threat to national security.

An example of a tribe struggling to combat gang violence—both domestic and foreign—is the Confederated Tribes of the Colville Reservation in Washington State. The Colville Tribe has over 9,300 members, making it one of the largest in the Northwest.⁵⁴ The reservation spans approximately 2,300 square miles, stretching the three available police officers beyond the breaking point for even routine law enforcement.⁵⁵ The lack of law enforcement resources and manpower

⁴⁶ See NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT at 41 (2009); DRUG THREAT ASSESSMENT 2008, *supra* note 38, at 4–7.

⁴⁷ Joel Millman, *Mexican Pot Gangs Infiltrate Indian Reservations in U.S.*, WALL ST. J., Nov. 5, 2009, at A1.

⁴⁸ See *id.*

⁴⁹ *Id.*; see also DRUG THREAT ASSESSMENT 2008, *supra* note 38, at 4–6, 17; *Raid Yields 40,000 Pot Plants on Reservation*, SEATTLE TIMES, Aug. 11, 2007, at B2, available at http://seattletimes.nwsourc.com/html/localnews/2003831497_potraid11m.html.

⁵⁰ Millman, *supra* note 47.

⁵¹ See *id.*; see also, e.g., COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, MEXICO'S DRUG CARTELS 7–8 (2007); Michael Ware, *Los Zetas Called Mexico's Most Dangerous Drug Cartel*, CNN, (Aug. 6, 2009), <http://www.cnn.com/2009/WORLD/americas/08/06/mexico.drug.cartels/index.html>.

⁵² See Millman, *supra* note 47.

⁵³ *Id.*

⁵⁴ *Oversight Hearings*, *supra* note 43, at 41.

⁵⁵ *Id.* at 41–42. For example, the response time on a call can exceed two hours in even the best of circumstances. *Id.* at 42, 44.

has made it impossible for the Tribe to respond to the increased presence of at least six different warring gangs.⁵⁶ The gangs on the Colville Reservation are both domestic—composed of Colville Tribe members—and imported—composed generally of Mexicans.⁵⁷ Like other reservations in the Pacific Northwest, the gang conflict on the Colville Reservation is centered on the distribution of illegal narcotics.⁵⁸

For many of the Colville Tribe gang members, gang affiliation is beginning to trump tribal affiliation, with many of the youth ignoring tribal values.⁵⁹ Over the past few years, the Colville Tribal Police Department has identified at least 19 narcotics cultivation operations and has seized more than 45,000 marijuana plants, most of which were connected to Mexican gangs.⁶⁰ Furthermore, violent crimes, previously unusual in the small communities of the Colville Reservation, are becoming much more common. In one incident, a Hispanic gang member was shot in a battle where at least eighteen rounds were fired.⁶¹

For the Colville Tribe, the gang problem is impossible to combat without outside assistance or a great influx of resources; unfortunately, as the reservation turns into a war zone, the cultural threads that tie the Tribe together threaten to unravel.

2. Domestic and Sexual Violence in Indian Country

Also generating significant amounts of attention over the past several years are the shockingly high rates of domestic and sexual violence committed against Native American women.⁶² Unlike gang activity, however, which seems to be a relatively recent phenomenon, domestic and sexual violence against women have long been a problem

⁵⁶ See *id.* at 41, 43–44.

⁵⁷ *Id.* at 41, 43.

⁵⁸ *Id.* at 43.

⁵⁹ *Id.* at 44.

⁶⁰ *Examining Drug Smuggling and Gang Activity in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 17, 18 (2009) [hereinafter *Examining Drug Smuggling*] (statement of Matt Haney, Chief of Police, Colville Tribes).

⁶¹ *Oversight Hearings*, *supra* note 43, at 43.

⁶² Amnesty Int'l, *supra* note 28, at 1–2; Deer, *supra* note 16, at 456 (citing TJADEN & THOENNES, *supra* note 27, at 22); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1903 (2009) (citing LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 24 (1997)); Clarkson, *supra* note 6 (citing TJADEN & THOENNES, *supra* note 27, at 22); *Weekend Edition*, *supra* note 6 (citing TJADEN & THOENNES, *supra* note 27, at 22).

for Native American women.⁶³ Increased reporting and attention, though, have brought the magnitude of the problem into focus.⁶⁴

Although difficult to measure and likely seriously under-reported,⁶⁵ recent studies suggest that over one-third of Indian women will be raped in their lifetime and almost two-thirds will be physically assaulted.⁶⁶ Incredibly, the annual rate of rape and sexual assault among Native Americans is over twice as high as in the population at large.⁶⁷ Furthermore, over fifteen percent of Indian women are raped by an intimate partner—a rate that is much higher nationally than for women of other backgrounds.⁶⁸ Compounding the severity of these problems, the rates at which perpetrators of domestic violence and sexual assault in Indian Country are prosecuted is significantly lower than elsewhere in the country.⁶⁹ Current studies suggest that in some areas approximately three-quarters of sexual crimes against women and children in Indian Country were declined for prosecution between 2004 and 2007.⁷⁰

The serious problem of domestic and sexual violence among Native Americans has not gone entirely unnoticed in Washington. For example, Title IX of the Violence Against Women Act of 2005 required the Attorney General to establish a Task Force to help the National Institute of Justice design and implement programs to research violence against Indian women.⁷¹ The Task Force convened for the first time in August 2008,⁷² and it has met again since then to discuss possible solutions to

⁶³ See Amnesty Int'l, *supra* note 28, at 1–2; Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 129–34 (2004) (describing the long history of sexual abuse and rape of Native American women).

⁶⁴ See, e.g., Amnesty Int'l, *supra* note 28, at 2.

⁶⁵ *Id.* at 2 (citing NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (2006)).

⁶⁶ E.g., TJADEN & THOENNES, *supra* note 27, at 22.

⁶⁷ The rate of rape and sexual assault against Native Americans in 1992 to 2001 was 5 per 1,000 persons age 12 or older, whereas for all races it is 2 per 1,000 persons age 12 or older. PERRY, *supra* note 25, at 5.

⁶⁸ PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 26 (2000).

⁶⁹ Quasius, *supra* note 62, at 1904; see also Amnesty Int'l, *supra* note 28, at 2.

⁷⁰ Riley, *supra* note 6.

⁷¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 904(a), 119 Stat. 3077–79 (2006).

⁷² Minutes of the Section 904 Violence Against Women in Indian Country Task Force Meeting, Dep't of Justice (Aug. 20–21, 2008), available at <http://www.ovv.usdoj.gov/docs/meeting-aug-08.pdf>.

the problem of crimes committed against women in Indian Country.⁷³ Efforts such as these, however, are merely a first step at combating one of the most serious issues facing the residents of Indian Country.⁷⁴ Indeed, domestic and sexual violence currently remains a serious issue facing many Native American women.

B. The Complex Patchwork of Criminal Jurisdiction in Indian Country

One of the primary culprits of the high rates of crime in Indian Country is the “complex patchwork of federal, state, and tribal law”⁷⁵ and criminal jurisdiction that allows many perpetrators—particularly non-Indians—to go unprosecuted.⁷⁶ Many Native Americans must rely upon federal prosecutors, who are often hundreds of miles away, to prosecute even minor crimes.⁷⁷ Not surprisingly, this leaves many offenses, even very serious ones, unprosecuted.⁷⁸ The confusing

⁷³ Minutes of the Section 904 Violence Against Women in Indian Country Task Force Meeting, Dep’t of Justice (Dec. 8–9, 2008), available at <http://www.ovv.usdoj.gov/docs/dec2008-meeting.pdf>.

⁷⁴ In one particularly heart-wrenching case, a Caucasian man who was married to an Indian woman sexually abused his entire family—repeatedly raping and molesting his wife and teenage daughters. Despite death threats, his wife reported him to an Eastern Cherokee prosecutor. The Indian prosecutor, however, was unable to prosecute due to the jurisdictional holding of *Oliphant* (since the husband was a non-Indian); state and local authorities were also unable to prosecute the husband. Clarkson, *supra* note 6.

⁷⁵ *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990). See also Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants’ Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974) (calling law enforcement in Indian Country a “jurisdictional crazy-quilt”). For a very detailed account of the many complexities of criminal jurisdiction in Indian Country, see Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

⁷⁶ See, e.g., *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 2 (2008) [hereinafter *Tribal Courts*] (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs) (describing the low rate of prosecution of reported crimes in Indian Country); see also S. REP. No. 111-93, at 9 (2009) (discussing jurisdictional gaps leading to under-prosecution in Indian Country, particularly for misdemeanor crimes such as domestic violence, child abuse, disorderly conduct, traffic violations, petty drug possession, and property crimes).

⁷⁷ See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 717 (2006).

⁷⁸ According to Department of Justice research statistics, there is a shocking disconnect between crimes reported or investigated in Indian Country and those actually prosecuted. For example, there were 6,036 suspects investigated for violent crimes in 2000. About twenty-five percent of these crimes were in Indian Country, but only about eighteen percent of charges filed in federal court for violent crimes were in Indian Country. PERRY, *supra* note 25, at 18, 20. Similarly, statistics also show that between 2004 and 2007, federal prosecutors declined to prosecute sixty-two percent of reservation crimes generally, about fifty percent of homicides, almost sixty percent of aggravated assaults, over seventy percent of child sex crimes, and over seventy-five percent of adult sex crimes. *Tribal Courts*, *supra* note 76, at 2.

arrangement of criminal jurisdiction in Indian Country is the product of a number of Congressional statutes and several Supreme Court decisions that have created a mismatched and mismanaged system in dire need of a complete overhaul.

Soon after the ratification of the Constitution, the federal government began asserting limited criminal jurisdiction over criminal matters in Indian Country when non-Indians committed crimes against Indians.⁷⁹ In 1817, this jurisdiction was statutorily expanded in the General Crimes Act (or Indian Country Crimes Act), which provided for federal criminal jurisdiction over matters in Indian Country, except in cases where the crime was committed by one Indian against another Indian.⁸⁰ Ultimately, this provision was codified as 18 U.S.C. § 1152.⁸¹ Under the General Crimes Act, the federal government has authority to try crimes committed by and against Indians, except when (1) one Indian committed a crime against another Indian, (2) an Indian had already been punished according to local tribal law, or (3) a treaty reserved criminal jurisdiction to the tribe.⁸² Giving additional teeth to the General Crimes Act is the Assimilative Crimes Act, which was passed in 1825.⁸³

There are signs, however, that the culture in Washington may be changing. Just months ago, Deputy Attorney General David W. Ogden issued a memorandum to all United States Attorney's Offices on the issue of violence in Indian country. Emphasizing the high crime rate in Indian Country, Deputy Attorney General Ogden instructed each United States Attorney's Office that contains Indian Country to engage the local tribes and coordinate a unified response to address the crime problem. Additionally, the memorandum directed each office to develop an operational plan "addressing public safety in Indian Country" in coordination with other federal law enforcement partners, tribal law enforcement, and, in Public Law 280 districts, state authorities. To coordinate the application of these plans, the Department of Justice created a new position dedicated to Indian Country prosecution and investigations. Memorandum from David W. Ogden, *supra* note 6, at 2–4. Such action is in marked contrast with the attitude of the Bush Administration regarding the prosecution of crime in Indian Country. Most famously, in late 2006, five United States Attorneys who were vocal supporters of increased prosecutions in Indian Country were fired. Riley, *supra* note 6.

⁷⁹ See, e.g., An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, sec. 5, 1 Stat. 137–38 (1790) ("[I]f any citizen . . . shall go into any town . . . belonging to any nation or tribe of Indians, and shall there commit any crime upon . . . which, if committed within the jurisdiction . . . would be punishable by the laws of such state or district, such offender . . . shall be subject to the same punishment."); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 731 n.6 (Neil Jessup Newton et al. eds., 2005).

⁸⁰ An Act to Provide for the Punishment of Crimes and Offences Committed Within the Indian Boundaries, ch. 92, secs. 1–2, 3 Stat. 383 (1817).

⁸¹ The General Crimes Act, 18 U.S.C. § 1152 (2006).

⁸² *Id.*

⁸³ An Act More Effectually to Provide for the Punishment of Certain Crimes Against the United States, and for Other Purposes, ch. 65, 4 Stat. 115 (1825); see also *United States v. Billadeau*, 275 F.3d 692, 694 (8th Cir. 2001) ("The General Crimes Act, 18 U.S.C. § 1152, creates federal jurisdiction over crimes committed by non-Indians against

The Assimilative Crimes Act, now codified at 18 U.S.C. § 13, provides that whoever is “guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District . . . shall be guilty of a like offense and subject to a like punishment.”⁸⁴ When combined, the two statutes provide federal jurisdiction over almost any conceivable offense in Indian Country, except when the previously described jurisdictional carve-outs⁸⁵ are applicable.⁸⁶

Prior to the passage of the Major Crimes Act,⁸⁷ the federal government did not have the authority to try crimes committed by Indians against other Indians in Indian country.⁸⁸ In response to the unpopular *Crow Dog* decision,⁸⁹ which enforced this limitation on jurisdiction, however, Congress passed the Major Crimes Act in 1885.⁹⁰ The Major Crimes Act granted the federal government jurisdiction over certain serious felonies committed in Indian Country, even when

Indians in Indian country. It incorporates the Assimilative Crimes Act (ACA), 18 U.S.C. § 13 . . .”).

⁸⁴ 18 U.S.C. § 13 (2006). Thus, under the Assimilative Crimes Act, when there is no federal statute on point governing behavior—as is often the case—the offender may be prosecuted for violating the laws of the state in which the land is located. *E.g.*, *United States v. Wood*, 386 F.3d 961, 963 (10th Cir. 2004) (“[T]he Assimilative Crimes Act . . . ‘requires courts to impose sentences for assimilative crimes that fall within the maximum and minimum terms established by state law.’”) (quoting *United States v. Garcia*, 893 F.2d 250, 254 (10th Cir. 1989)); *United States v. Errol D.*, 292 F.3d 1159, 1164 (9th Cir. 2002); *Billadeau*, 275 F.3d at 694.

⁸⁵ *See supra* note 82 and accompanying text. On grounds of federalism, the Act has been interpreted not to apply when a non-Indian commits a crime against another non-Indian in Indian Country. *See United States v. McBratney*, 104 U.S. 621, 624 (1881).

⁸⁶ Although the Assimilative Crimes Act does not specifically state that it applies to Indian tribes, it has been interpreted by the Supreme Court to apply to Indian Country. *See Williams v. United States*, 327 U.S. 711, 713–14 (1946); COHEN’S, *supra* note 79, at 733 (citing 18 U.S.C. § 13).

⁸⁷ Major Crimes Act, ch. 341, sec. 9, 23 Stat. 362, 385 (1885).

⁸⁸ *See Ex Parte Crow Dog*, 109 U.S. 556, 568–69, 572 (1883). Crow Dog, a member of the Brulé Sioux Tribe, murdered Spotted Tail, a Sioux chief, who had used his influence in the tribe to stave off hostilities between the Sioux and the U.S. Government. Crow Dog was tried according to tribal custom, and his family agreed to make a peace payment to Spotted Tail’s family. Unhappy with the result under traditional tribal law, however, a federal Indian agent had Crow Dog arrested and tried for murder the following year. Despite the lack of jurisdiction under the General Crimes Act, Crow Dog was convicted of murder and sentenced to death. In 1883, the United States Supreme Court reversed the conviction on tribal sovereignty grounds. For an account of the Crow Dog case, see SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 100–41 (1994).

⁸⁹ HARRING, *supra* note 88, at 101. *See supra* note 88 and accompanying text.

⁹⁰ Major Crimes Act sec. 9.

committed by Indians against other Indians.⁹¹ The constitutionality of this Act was upheld soon afterward by the Supreme Court in *United States v. Kagama*,⁹² and it remains a mainstay of federal jurisdiction in Indian Country.⁹³ The Major Crimes Act specifically provides that there is federal jurisdiction over Indians for the enumerated felonies, such as murder, kidnapping, and robbery.⁹⁴ Although the Major Crimes Act clearly divests the states of criminal jurisdiction in Indian Country, by its plain language the Major Crimes Act does not divest Indian tribes of concurrent jurisdiction over these offenses.⁹⁵ The statute instead

⁹¹ 18 U.S.C. § 1153 (2006).

Offenses committed within Indian country:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, 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, shall be 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.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

⁹² 118 U.S. 375, 385 (1886).

⁹³ See *United States v. Antelope*, 430 U.S. 641, 646, 649–50 (1977) (rejecting a challenge to the constitutionality of the Major Crimes Act under Equal Protection grounds for the prosecution of Indians in federal court for offenses that would be punishable in state court if committed by a non-Indian because the Major Crimes Act “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions” and not a racial classification).

⁹⁴ See *supra* note 91 and accompanying text. The Act has also been interpreted by the Supreme Court to include lesser offenses not enumerated in that section if the defendant is charged with a greater enumerated offense. See *Keeble v. United States*, 412 U.S. 205, 214 (1973). Additionally, the Act has also been interpreted to extend to firearms offenses. Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT’G REP. 153, 154 (1998).

⁹⁵ COHEN’S, *supra* note 79, at 758 (describing the jurisdiction over major crimes as concurrent); Matthew L. M. Fletcher, *United States v. Lara: Affirmation of Tribal Criminal Jurisdiction over Nonmember American Indians*, 83 MICH. B.J. 24, 25 (2004) (same, citing 18 U.S.C. § 1153); Sands, *supra* note 94, at 154 (same). Although there is no clear answer, the legislative history of the statute suggests that Congress considered, and rejected, exclusive federal jurisdiction. See 16 CONG. REC. 934–35 (1885); see also *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990) (noting that concurrent tribal jurisdiction over crimes under the Major Crimes Act is an open question). *But compare* *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (holding that a tribal court is competent to try a tribal member for a crime covered by the Major Crimes Act), *with* *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1068 (D.N.D. 2009) (“The Indian Major Crimes Act provides the federal courts with

stretches a layer of federal jurisdiction over specific offenses, and when paired with the General and Assimilative Crimes Acts, federal jurisdiction exists over a wide variety of felonies and misdemeanors committed in Indian Country.⁹⁶

The previously described system is arguably one of concurrent jurisdiction for all offenses committed in Indian Country (and surely so for those crimes not enumerated in the Major Crimes Act).⁹⁷ It has been complicated by two additional factors, however: (1) the Supreme Court and Congress have severely limited tribal jurisdiction and authority,⁹⁸ and (2) Public Law 280 allocated criminal jurisdiction to nine state governments.⁹⁹ First, although tribes arguably have jurisdiction to try all offenses, Congress severely constrained their ability to provide adequate and proportional punishments through the Indian Civil Rights Act, which was passed in 1968.¹⁰⁰ The primary purpose of ICRA was to impose the provisions of the Bill of Rights against tribal governments to cure alleged due process abuses by tribal courts.¹⁰¹ In addition to guaranteeing substantive personal rights, ICRA also placed a serious constraint on tribal power by limiting the authority of tribal courts to impose for “any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both.”¹⁰² This provision places a severe limitation on the ability of tribal governments to punish and deter crime adequately, as punishments in excess of one year can only be levied if an individual commits multiple separate offenses.¹⁰³ Accordingly, ICRA served to increase the reliance of tribes on federal prosecutors drastically.¹⁰⁴

Supreme Court decisions further limited the power of tribal courts to enforce criminal law in Indian Country. In 1978, the Supreme Court

exclusive jurisdiction over certain enumerated crimes committed in Indian country. It does not contain an exception for Indians punished under tribal law.”), *and* *Iron Crow v. Ogallala Sioux Tribe*, 129 F. Supp. 15, 20 (D.S.D. 1955) (describing the Major Crimes Act as divesting tribes of authority over those offenses).

⁹⁶ 18 U.S.C. §§ 13, 1152, 1153 (2006).

⁹⁷ *See supra* note 95 and accompanying text.

⁹⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁹⁹ Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588.

¹⁰⁰ Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 77–78 (codified at 25 U.S.C. §§ 1301–03 (2006)).

¹⁰¹ *Clinton*, *supra* note 75, at 561 (citing 25 U.S.C §§ 1301–03 (1970)).

¹⁰² 25 U.S.C. § 1302(7) (2006). Although the text of the statute suggests that consecutive sentences of one year for multiple offenses arising from the same incident would be within the power of a tribal court, this point is less than clear.

¹⁰³ These types of strategies have occasionally run into due process issues. *See, e.g.*, *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176, 1180–82 (D. Minn. 2005) (holding that different crimes committed during a single incident were only one offense under the ICRA and could not be punished by more than one year in prison).

¹⁰⁴ *Washburn*, *supra* note 77, at 717.

held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have the authority to try non-Indians in tribal courts.¹⁰⁵ At the time of the decision, of the 127 reservations that exercised criminal jurisdiction in their tribal court systems, thirty-three extended jurisdiction to non-Indian defendants.¹⁰⁶ In *Oliphant*, the Supreme Court entertained a writ of *habeas corpus* from the petitioner, who had been arrested and tried in a tribal court for assaulting a tribal police officer.¹⁰⁷ In granting the *habeas* petition,¹⁰⁸ the Supreme Court ruled that the tribal courts had been divested of their criminal jurisdiction over non-Indians “[b]y submitting to the overriding sovereignty of the United States.”¹⁰⁹ This historical submission was a surrender of the “power to try non-Indian citizens of the United States except in a manner acceptable by Congress.”¹¹⁰ Thus the Supreme Court seriously limited the jurisdiction of tribal courts, and it left the prosecution of non-Indians who commit crimes on reservations solely to state or federal prosecutors. This fact is even more damaging as recent statistics suggest that a large percentage of the crimes committed in Indian country are committed by non-Indians.¹¹¹ The *Oliphant* decision was a major blow to the tribal court system, leaving many residents of Indian Country unprosecutable without independent federal or state action.

The Supreme Court limited the jurisdiction of tribal courts even further in 1990 in *Duro v. Reina*.¹¹² In that decision, the Supreme Court considered whether the Salt River Pima-Maricopa Indian Community could exercise criminal jurisdiction over Albert Duro, an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians.¹¹³ Duro had “allegedly shot and killed a 14-year-old boy within the Salt River Reservation boundaries.”¹¹⁴ Under *Oliphant*, the Supreme Court held that the tribe had surrendered sovereign authority to Congress, and

¹⁰⁵ 435 U.S. 191, 211–12 (1978).

¹⁰⁶ *Id.* at 196.

¹⁰⁷ *Id.* at 194–95. Oliphant was arraigned and charged under tribal code. He then filed a writ of *habeas corpus* to the Western District of Washington. This writ was denied; the decision was appealed to the Ninth Circuit, but was upheld. Upon denial, the United States Supreme Court granted certiorari. *Id.*

¹⁰⁸ *See id.* at 212.

¹⁰⁹ *Id.* at 210.

¹¹⁰ *Id.*

¹¹¹ PERRY, *supra* note 25, at 9.

¹¹² 495 U.S. 676 (1990).

¹¹³ *Id.* at 679.

¹¹⁴ *Id.* The Court also relied on *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (holding that divestiture of sovereignty has occurred in relations between an Indian tribe and nonmembers of the tribe). *Duro*, 495 U.S. at 685.

therefore had been divested of its jurisdictional authority to try all non-members in tribal court.¹¹⁵

Upon the heels of the decision, however, came an organized outcry from Indian Country.¹¹⁶ Responding to this pressure, Congress legislatively overturned *Duro* just six months later in an appropriations bill¹¹⁷ and permanently enacted the now-famous “*Duro-Fix*” in 1991.¹¹⁸ The “*Duro-Fix*” amended ICRA to clarify that Indian tribes had authority to try “all Indians,” rather than just those who were members of the specific tribe.¹¹⁹ The Supreme Court upheld the “*Duro-Fix*” as constitutional in 2004 in *United States v. Lara*, preserving tribal jurisdiction over all Indians.¹²⁰

The final, but significant, patch in the confusing jurisdictional quilt is Public Law 280 (“PL-280”), which fundamentally altered the justice system in many parts of Indian Country in 1953.¹²¹ PL-280 withdrew federal criminal jurisdiction in six states and authorized state prosecutions in those areas.¹²² PL-280 also provided for the potential assumption of criminal and civil jurisdiction in additional states without Indian consent in the future¹²³ (ten of which assumed jurisdiction before PL-280 was amended in 1968).¹²⁴ Although it was an attempt to remedy crime problems in Indian Country,¹²⁵ PL-280 has largely been a failure. From the start, PL-280 left both the Indians and the states involved “dissatisfied”—the states because they were saddled with additional responsibilities without additional funding, and the tribes because state jurisdiction was imposed on them without their consent.¹²⁶ In response to

¹¹⁵ *Duro*, 495 U.S. at 684–85.

¹¹⁶ Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 11 (2004).

¹¹⁷ *Id.* at 12 (citing Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93 (1990)).

¹¹⁸ *Id.* at 17.

¹¹⁹ 25 U.S.C. § 1301(2), (4) (2006).

¹²⁰ 541 U.S. 193, 210 (2004).

¹²¹ Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588; *see also* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

¹²² Act of Aug. 15, 1953, Pub. L. No. 280 § 2(a). The original “mandatory” states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*; Clinton, *supra* note 75, at 565–66.

¹²³ Act of Aug. 15, 1953, Pub. L. No. 280, secs. 6, 7.

¹²⁴ Goldberg-Ambrose, *supra* note 21, at 1407. The states that assumed at least partial jurisdiction prior to 1968 were Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah. CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, 244 (1997).

¹²⁵ Goldberg-Ambrose, *supra* note 21, at 1406 (quoting *Bryan v. Itasca Cnty.* 426 U.S. 373, 379 (1976)).

¹²⁶ Goldberg, *supra* note 21, at 538.

pitched criticisms, the law was amended fifteen years later as part of ICRA,¹²⁷ making further state assumptions of jurisdiction dependent upon tribal consent.¹²⁸ Not surprisingly, since the amendment passed, no tribe has consented to state jurisdiction.¹²⁹ Despite the Act's unpopularity, however, the amendments did not apply to the tribes that were already under state jurisdiction.¹³⁰ The tribes in these jurisdictions remain largely dependent upon state prosecutions today.¹³¹ Even though the goal of PL-280 was to increase criminal enforcement in Indian Country, the law actually served to create an even wider gap by allocating responsibility to states that had neither the means nor the interest in strenuously prosecuting crimes on behalf of Indians.¹³² Furthermore, the law engendered confusion over whether tribal courts even retained concurrent jurisdiction to try violations of criminal law themselves.¹³³

¹²⁷ Goldberg-Ambrose, *supra* note 21, at 1407.

¹²⁸ See 25 U.S.C. § 1326 (2006).

¹²⁹ Goldberg-Ambrose, *supra* note 21, at 1408.

¹³⁰ *Id.*

¹³¹ The limitations in ICRA on the maximum punishments and jurisdictional limitations from *Oliphant* apply in full to PL-280 reservations as well, leaving the prosecution of all non-Indians and serious crimes to the states. See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AMERICAN INDIAN DEVELOPMENT ASSOCIATES, <http://www.aidainc.net/Publications/pl280.htm> (last visited Nov. 8, 2010).

¹³² See *Examining S. 797, the Tribal Law and Order Act of 2009: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 50 (2009) [hereinafter *S. Tribal Law and Order Act of 2009*] (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California) (describing the negative effects of PL-280 on law enforcement in Indian Country in the state of California); Goldberg, *supra* note 21, at 552. For example, the Omaha and Winnebago reservations in Nebraska were disastrously left with no law enforcement upon the withdrawal of federal officers. Goldberg, *supra* note 21, at 552 (citing JOHN A. HANNAH ET AL., JUSTICE: UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 148 (1961)); see also Goldberg-Ambrose, *supra* note 21, at 1418 (“[J]urisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. . . . Sometimes they arise because the government(s) that may have authority in theory has no institutional support or incentive for the exercise of that authority.”).

¹³³ See Jiménez & Song, *supra* note 23, at 1667 (arguing that PL-280 is not a divestiture statute); see also COHEN'S, *supra* note 79, at 759 (“Certainly the language of the statute is not sufficiently explicit to deprive tribes of their retained concurrent jurisdiction.”). The position that PL-280 did not divest the tribes of criminal jurisdiction seems to be the best argument. The Eighth Circuit addressed this issue and held that PL-280 did not divest the tribes of the sovereign power to punish their own members. See *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (“Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law.”); see also *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999) (PL-280 did not divest tribal courts of concurrent civil jurisdiction); *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559–62 (9th Cir. 1991) (holding that PL-280 did not divest tribes of jurisdiction over child custody proceedings); *Cabazon Band of Mission Indians v.*

The end result of this array of statutes, Supreme Court decisions, and jurisdiction based on tribal sovereignty is, indeed, a “jurisdictional crazy-quilt.”¹³⁴ In some parts of Indian Country, the federal government is straddled with prosecuting the bulk of reported crimes.¹³⁵ In other parts of Indian Country, it is the state governments that prosecute these crimes.¹³⁶ This quilt can be made even more confusing when complex crimes span several jurisdictions, or when victims are unable to identify exactly where a crime took place.¹³⁷ Beyond simple confusion over who is responsible for prosecuting certain offenses, this patchwork of jurisdiction can also create difficulties investigating crimes and making arrests.¹³⁸ Most problematically, the individuals who are most affected by the inefficient and ineffective prosecution of criminals in Indian Country—Native American residents—are unable to prosecute many potential defendants due to *Oliphant*¹³⁹ and are unable to deter most crimes adequately due to the severe sentencing limitations in the ICRA.¹⁴⁰ With this arrangement in place, it should not be surprising that prosecution rates are significantly lower and crimes rates significantly higher in Indian Country than elsewhere in the country.¹⁴¹

Smith, 34 F. Supp. 2d 1195, 1199 (C.D. Cal. 1998) (P.L. 280 does not divest tribes of their criminal jurisdiction); State v. Schmuck, 850 P.2d 1332, 1343 (Wash. 1993) (same).

¹³⁴ Vollman, *supra* note 75, at 387.

¹³⁵ See *supra* Part I.B.

¹³⁶ See *supra* Part I.B.

¹³⁷ See COHEN’S, *supra* note 79, at 762.

¹³⁸ *Id.* at 763–65 (describing confusion over whether tribal law enforcement has authority to make arrests in different situations).

¹³⁹ See *supra* Part I.B.

¹⁴⁰ See *supra* Part I.B.

¹⁴¹ Simply to display the great complexity of criminal jurisdiction in Indian Country, a chart from the United States Attorneys’ manual is reprinted below. This chart, meant to be a guide, outlines jurisdiction in three different situations in Indian Country (first, where jurisdiction has not been conferred on the states; second, where jurisdiction has been conferred on the states pursuant to PL-280; and finally, where jurisdiction has been conferred on the state under other statutes). Within each of these situations, determining jurisdiction requires considering the tribal status of the offender and the victim as well as where the crime was committed. See U.S. DEP’T. OF JUSTICE, JURISDICTIONAL SUMMARY 689 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

Where jurisdiction has not been conferred on the state:

<u>Offender</u>	<u>Victim</u>	<u>Jurisdiction</u>
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.

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

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

<u>Offender</u>	<u>Victim</u>	<u>Jurisdiction</u>
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	“Mandatory” state has jurisdiction exclusive of federal and tribal jurisdiction. “Option” state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	“Mandatory” state has jurisdiction exclusive of federal government but not necessarily of the tribe. “Option” state has concurrent jurisdiction with the federal courts.

C. Lack of Funding for Tribal Law Enforcement

One additional factor that significantly contributes to the high rates of crime and low rates of prosecution in Indian Country is the lack of

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

Where jurisdiction has been conferred by another statute:

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

Id. Under DOJ standards, an “Indian” is an individual who has Indian ancestry and who belongs to a federally recognized Indian tribe. *About Native Americans*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/otj/nafaqs.htm> (last visited Oct. 29, 2010).

funding for tribal law enforcement agencies.¹⁴² As of June 2000, American Indian tribes operated 171 law enforcement agencies and the BIA operated another thirty-seven.¹⁴³ Although these agencies are responsible for the lion's share of direct law enforcement in Indian Country, most do not have the manpower, training, or financial resources needed to police adequately the often-enormous areas for which they are responsible.¹⁴⁴

An extensive report on tribal law enforcement published in 2001 by the DOJ concluded:

The typical [tribal police] department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time In other words, the typical setting is a large area with a relatively small population patrolled by a small number of police officers; the superficial description is of a rural environment with rural-style policing. In fact, many reservation residents live in fairly dense communities, which share attributes of suburban and urban areas.¹⁴⁵

For example, the Colville Reservation generally has three full-time officers on duty at any given time, responsible for almost 2,300 square miles with around 9,350 residents.¹⁴⁶ Similarly, the Confederated Salish and Kootenai Tribes in Montana employ seventeen officers, who patrol a 1.2 million-acre area with a population of about 24,000 residents.¹⁴⁷ One of the largest and most developed departments is the Navajo Nation's, with 321 police officers.¹⁴⁸ The department is still stretched thin, however, as these officers are responsible for an area of over 22,000 square miles,¹⁴⁹ home to approximately 180,000 residents.¹⁵⁰ Overall, Indian Country is patrolled by approximately 1.3 officers per 1,000

¹⁴² See S. REP. NO. 111-93, at 6 (2009).

¹⁴³ HICKMAN, *supra* note 26, at 1.

¹⁴⁴ For example, the 2008 Bureau of Indian Affairs Crime Report concluded that there were at least thirty Indian reservations where the violent crime rates exceeded national averages. S. REP. NO. 111-93, at 6-7. The Wind River Indian Reservation in Wyoming has a violent crime rate of over 3.58 times higher than national rates, but it only has 6-7 officers patrolling the entire 2.2 million-acre reservation. *Id.*

¹⁴⁵ WAKELING ET AL., *supra* note 25, at vi.

¹⁴⁶ *Examining Drug Smuggling*, *supra* note 60, at 17-18, 20; *Oversight Hearings*, *supra* note 43, at 41.

¹⁴⁷ WAKELING ET AL., *supra* note 25, at 33-34.

¹⁴⁸ DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 482 (5th ed. 2005).

¹⁴⁹ *Id.*

¹⁵⁰ Washburn, *supra* note 77, at 711. By comparison, the Reno, Nevada police department is also responsible for approximately 180,000 residents. Although the Reno police force has about 320 officers, it is only responsible for 57.5 square miles. HICKMAN, *supra* note 26, at 2.

residents, whereas the national average is approximately 2.3 officers per 1,000 residents.¹⁵¹

If the sheer size and understaffing of the departments were not enough, inadequate funding and resources further hinder them. Tribal law enforcement agencies generally only have between fifty-five and seventy-five percent of the resources available to non-Indian communities.¹⁵² About \$83 is spent per resident in Indian Country on law enforcement, while the national average is closer to \$130 per resident.¹⁵³ Additionally, given that the crime rate in much of Indian Country is very high, many tribal law enforcement agencies require funding in excess of the national average to deal with the crime already occurring in their communities.¹⁵⁴ Moreover, many of the physical resources used by Indian police departments are sorely inadequate. For example, many buildings and facilities are outdated or too small, computer systems are old or absent, and many vehicles are in poor condition.¹⁵⁵ Likewise, the jail facilities in Indian Country are notoriously overcrowded and inadequate for current needs.¹⁵⁶

Due to the state of most tribal police departments, crimes in many parts of Indian Country are under-reported and under-enforced. For example, in 1996, one tribe reported no major crimes to federal authorities for a period of several months—a “precipitous and unlikely” drop.¹⁵⁷ The problems caused by under-reporting of crimes are exacerbated by the high rates of prosecution declination by many United States Attorney’s Offices.¹⁵⁸ Although important tribal interests are served by local control over law enforcement,¹⁵⁹ the federal government’s

¹⁵¹ WAKELING ET AL., *supra* note 25, at 27.

¹⁵² *Id.* at vii. According to a Senate Report accompanying the TLOA, fewer than 3,000 Bureau of Indian Affairs and tribal law enforcement officers patrol more than 56 million acres of Indian Country in 35 states. This figure amounts to an approximate unmet staffing need of forty percent when compared to similar rural communities. S. REP. NO. 111-93, at 6 (2009).

¹⁵³ WAKELING ET AL., *supra* note 25, at 27.

¹⁵⁴ *See id.* at vii.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.*; *see also* TODD D. MINTON, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 228271, JAILS IN INDIAN COUNTRY, 2008 5 (2009).

¹⁵⁷ WAKELING ET AL., *supra* note 25, at 14.

¹⁵⁸ *See supra* note 69.

¹⁵⁹ Beginning in the 1960s and particularly since the 1970s, federal Indian policy has been dominated by self-determination. This policy focuses on reinvigorating tribal self-governance and recognizes tribal sovereignty. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(b) (2006); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243 (2006); Tribally Controlled College or University Assistance Act, 25 U.S.C. §§ 1801–52 (2006).

trust responsibility to the tribes also necessitates that greater federal funding and resources be allocated to tribal police forces.¹⁶⁰

II. CONGRESS' SOLUTION: THE TRIBAL LAW AND ORDER ACT OF 2010

The current crime crisis in Indian Country has not gone unnoticed by Congress. Rather, Congress has long been aware of the high crime rates among Native Americans. Indeed, some of the causes of the problems were actually misguided attempts by Congress to decrease Indian Country crime.¹⁶¹ Recently, President Obama signed legislation that has the potential to serve as an important short-term remedy to

¹⁶⁰ The trust responsibility of the federal government to the Indian tribes has a long heritage and continues to exist even today during the era of self-determination. The doctrine has its origins in the Removal Era and has repeatedly reinforced a basis of unique federal power in Indian Country. *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 411–12 n.12 (1968) (“Wisconsin contends that any hunting or fishing privileges . . . did not survive the dissolution . . . of the trusteeship of the United States over the Menominees.”); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (“In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. . . . [I]t has charged itself with moral obligations of the highest responsibility and trust.”); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941) (“[A]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (“From their very weakness and helplessness . . . there arises the duty of protection” (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886))); *Kagama*, 118 U.S. at 383–84 (“These Indians tribes *are* the wards of the nation. They are communities *dependent* on the United States.”); *Worcester v. Georgia*, 31 U.S. 515, 587 (1832) (“By the first president of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians.”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“[The Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”); *see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (explaining the federal trust responsibility).

Although the exact contours of the modern doctrine are not always clear, the federal government retains a trust duty to protect and care for the well-being of the Indian tribes in a number of areas. *E.g., United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (stating that there is an “undisputed existence of a general trust relationship between the United States and the Indian people” (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983))); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003) (“[T]he Government is subject to duties as a trustee”); *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (“Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.”); *United States v. Mitchell*, 445 U.S. 535, 548 (1980) (White, J., dissenting) (“When Congress established a ‘trust’ for the Indian allottees it is not sensible to assume an intent to depart from these well-known fiduciary principles.”); H.R. Res. 1924, 111th Cong. § 2(a)(1) (2009) (stating that “the United States has distinct legal, treaty, and trust obligations to provide for the public safety of tribal communities”).

¹⁶¹ *See supra* Part I.B.

many of the crime problems in Indian Country.¹⁶² Unlike many previous efforts by Congress, the Tribal Law and Order Act of 2010 is a coordinated and well-designed response. The Act is a crucial first step in making Indian Country a safer place. The Act does not completely overhaul the criminal justice system in Indian Country, however; it instead focuses attention on particular problem areas that most badly need attention in the near future.

The TLOA of 2008 was initially introduced in the Senate by Senator Byron Dorgan (D-ND), Chairman of the U.S. Senate Committee on Indian Affairs,¹⁶³ and by Representative Stephanie Herseth Sandlin (D-SD).¹⁶⁴ Upon its expiration at the end of the 110th Congress, the TLOA was reintroduced in both the House and Senate in April 2009 as the TLOA of 2009.¹⁶⁵ By January 2010, the TLOA of 2009 was referred to the Committee in the House;¹⁶⁶ it was approved in the Senate by the Committee and was recommended for full Senate consideration.¹⁶⁷ Despite widespread bipartisan support, however, the TLOA of 2009 languished during the spring and early summer months, and it seemed destined to expire like its 2008 predecessor. Fortunately, though, the Tribal Law and Order Act was voted on and passed by both Houses of Congress and subsequently signed into law by President Obama on July 29, 2010, amid stated support from a variety of sources and outlets.¹⁶⁸

In the Senate, the TLOA of 2009 was appended as the TLOA of 2010, with slight modifications, to the Indian Arts and Crafts

¹⁶² Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

¹⁶³ Tribal Law and Order Act of 2008, S. 3320, 110th Cong. 1. The Senate Committee on Indian Affairs held hearings during the 110th Congress on various topics related to criminal justice in Indian Country. As a result of these hearings, Senator Dorgan released a concept paper recommending changes to the criminal justice system in Indian Country. On July 23, 2008, Senator Dorgan and twelve fellow sponsors, including Senators Baucus, Biden, Bingaman, Cantwell, Domenici, Johnson, Kyl, Lieberman, Murkowski, Smith, Tester, and Thune, introduced the Tribal Law and Order Act of 2008. The Committee on Indian Affairs did not report out the bill during the 110th Congress, however, and the bill expired. S. REP. NO. 111-93, at 4 (2009).

¹⁶⁴ Tribal Law and Order Act of 2008, H.R. 6583, 110th Cong. 1.

¹⁶⁵ Tribal Law and Order Act of 2009, H.R. 1924, 111th Cong.; Tribal Law and Order Act of 2009, S. 797, 111th Cong. (2009).

¹⁶⁶ *H.R. 1924: Tribal Law and Order Act of 2009*, GOVTRACK.US (July 21, 2010, 6:23 AM), <http://www.govtrack.us/congress/bill.xpd?bill=h111-1924>.

¹⁶⁷ *S. 797 Tribal Law and Order Act of 2009*, GOVTRACK.US (June 27, 2010, 9:12 PM), <http://www.govtrack.us/congress/bill.xpd?bill=s111-797>.

¹⁶⁸ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261; Troy A. Eid, *Bringing Justice to Indian Country*, DENVERPOST.COM (Aug. 3, 2010, 06:04 AM), [http://www.denverpost.com/opinion/ci_15661714](http://www.denverpost.com/opinion/ci_15661714; Obama Signs Bill Targeting Crime on Indian Reservations); *Obama Signs Bill Targeting Crime on Indian Reservations*, CNN.COM (July 29, 2010, 5:40 PM), http://articles.cnn.com/2010-07-29/politics/obama.reservations.act_1_tribal-courts-tribal-law-lawenforcement?s=PM:POLITICS.

Amendments Act of 2010 (“IACAA”).¹⁶⁹ The IACAA expands the ability of tribal authorities to prosecute sellers of misrepresented Indian goods or products and was previously passed by the House.¹⁷⁰ The 2010 version of the TLOA is substantially the same as the 2009 version that was considered by committee in both Houses of Congress.¹⁷¹ The IACAA, containing the TLOA of 2010, passed the Senate on June 23, 2010, by unanimous consent.¹⁷² Not unexpectedly, the House of Representatives passed the amended version of the IACAA on July 21, 2010, by a vote of 326 to 92.¹⁷³ The Act received a unanimous vote of Democrat Representatives, and it was narrowly rejected by Republican Representatives by a vote of 78 to 92.¹⁷⁴ Although a majority of Republicans voting in the House voted against the Act, much of the stated opposition stemmed not from the content of the TLOA, but from the manner by which the Senate amended the IACAA to include the TLOA, robbing the House of the opportunity to propose its own amendments.¹⁷⁵ Upon passage by the House, the IACAA and TLOA were signed into law by President Obama in a very moving ceremony, during which President Obama comforted Lisa Marie Iyotte, a Native American rape victim who openly wept as she described the crime committed against her in 1994 during her introduction of the TLOA.¹⁷⁶

The TLOA is multi-faceted and addresses a number of issues related to crime in Indian Country. Its primary goals¹⁷⁷ are to improve

¹⁶⁹ 111 CONG. REC. S5306, S5365–76 (daily ed. June 23, 2010).

¹⁷⁰ Indian Arts and Crafts Amendment of 2010, H.R. 725, 111th Cong. §§ 102–03 (2010).

¹⁷¹ Compare H.R. 1924, 111th Cong. (2009), and S. 797, 111th Cong. (2009), with H.R. Res. 725, 111th Cong. (2010).

¹⁷² H.R. 725: *Indian Arts and Crafts Amendments Act of 2010*, GOVTRACK.US (Oct. 13, 2010, 2:41 PM), <http://www.govtrack.us/congress/bill.xpd?bill=h111-725>.

¹⁷³ *Final Vote Results for Roll Call 455*, CLERK.HOUSE.GOV, <http://clerk.house.gov/evs/2010/roll455.xml> (last visited Oct. 30, 2010).

¹⁷⁴ *Id.*

¹⁷⁵ 111 CONG. REC. H5862–64 (daily ed. July 21, 2010) (statements of Rep. Hastings and Rep. Pastor).

¹⁷⁶ *Remarks by the President Before Signing the Tribal Law and Order Act*, WHITEHOUSE.GOV (July 29, 2010, 4:58 PM), <http://www.whitehouse.gov/photos-and-video/video/signing-tribal-law-and-order-act>. Lisa Marie Iyotte was raised as a Sicangu Lakota Sioux. She was attacked and raped in 1994, but as has been too often the case, the perpetrator was never convicted of the crimes he committed against her. *Id.*

¹⁷⁷ The stated goals of the TLOA include the following: “to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country;” “to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies;” “to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country;” “to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women;” “to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country;”

the effectiveness of Indian law enforcement by providing tribal police and justice officials with additional tools and resources; improving the coordination between state, federal, and tribal law enforcement agencies; and increasing federal accountability for the safety of the residents of Indian Country.¹⁷⁸ Most notably, the TLOA increases the sentencing authority of tribal courts to three years' imprisonment,¹⁷⁹ provides for concurrent state and federal jurisdiction in PL-280 states upon tribal consent,¹⁸⁰ increases the resources available to tribal law enforcement agencies,¹⁸¹ and includes a number of provisions designed to target domestic and sexual violence committed against Native American women.¹⁸²

Generally, the TLOA alternates between providing additional resources to tribal law enforcement agencies and centralizing the enforcement of criminal law in Indian Country in the hands of the federal government. These strategies exist in tension with one another to some degree; however, they also recognize the competing interests of tribal sovereignty in the self-determination era and the long-standing responsibility of the federal government for the well-being of the tribes through the trust doctrine. As previously discussed, many—if not all—of the law enforcement problems can be directly traced to the actions of the federal government.¹⁸³ Although the federal trust responsibility is often offered as the legal justification for federal intrusion into Indian affairs,¹⁸⁴ in this case, the federal trust responsibility to the Native Americans can be viewed as mandating the passage of the TLOA (or other comparable legislation) as part of a federal duty to provide basic social services to tribal members.¹⁸⁵ Indeed, the very basis for the

and “to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country.” Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(b), 124 Stat. 2261, 2263.

¹⁷⁸ Press Release, S. Comm. on Indian Affairs, Legislation Gives Boost to Law & Order in Indian Country (July 23, 2008), *available at* <http://indian.senate.gov/news/press/releases/2008-07-23.cfm>.

¹⁷⁹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(b), 124 Stat. 2258, 2279.

¹⁸⁰ *Id.* § 221.

¹⁸¹ Tribal Law and Order Act of 2010, Subtitles C–E, 124 Stat. 2258, 2272–99.

¹⁸² Tribal Law and Order Act of 2010, Subtitle F, 124 Stat. 2258, 2299–2301.

¹⁸³ *See supra* Part I.B.

¹⁸⁴ Roger Florio, Note, *Water Rights: Enforcing the Federal-Indian Trust After Nevada v. United States*, 13 AM. INDIAN L. REV. 79, 87 (1987).

¹⁸⁵ *See* Chambers, *supra* note 160, at 1243–44 (discussing a fiduciary duty of the government to provide services to the Indian tribes); *see also* Friends Committee on National Legislation, *The Origins of Our Trust Responsibility Towards the Tribes*, FCNL.ORG (June 10, 2010), http://www.fcnl.org/issues/item.php?item_id=1300&issue_id=95

Supreme Court's decision in *Kagama* arose from the duty of Congress to protect Indians,¹⁸⁶ and now, when the residents of Indian Country live in danger with minimal protection from law enforcement, Congressional action is needed.¹⁸⁷ Although likely not a judicially enforceable duty, a strong argument can be made that failing to pass the TLOA would have been a dereliction of Congress' trust responsibility to the Native Americans.

A. Increased Coordination Between Federal and Tribal Law Enforcement and Greater Federal Accountability

An important focus of the TLOA is increasing the coordination and communication between federal and tribal law enforcement agencies. As part of this effort, one of the major changes in the Act is the creation, within the BIA,¹⁸⁸ of an office called the "Office of Justice Services." This new office will take on the responsibilities of the Division of Law Enforcement Services as enumerated in 25 U.S.C. §§ 2802(b)–(c).¹⁸⁹ The office is also tasked with a number of new responsibilities, focused primarily on coordinating federal and tribal law enforcement efforts.¹⁹⁰ Most notably, these new responsibilities include opening a meaningful dialogue with tribal leaders in developing coordinated policies in Indian Country;¹⁹¹ providing assistance and training to tribal law enforcement in accessing and using the National Criminal Information Center ("NCIC") database;¹⁹² collecting information on Indian Country crimes annually in coordination with the Attorney General;¹⁹³ and compiling detailed spending reports, including current expenses and a list of unmet staffing needs of law enforcement and court personnel in tribal and BIA

(discussing the various responsibilities of Congress to Indian tribes based upon the federal trust responsibility).

¹⁸⁶ *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

¹⁸⁷ The TLOA itself recognizes that the Act is an attempt to fulfill the federal trust responsibility. *See* Tribal Law and Order Act of 2010 § 202(a)(1) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country . . .").

¹⁸⁸ The BIA is the most important federal office in Indian Country because it is the primary arm by which federal policy is applied to Indian Country. The office is located within the Department of the Interior and was founded in 1824. *BIA: Who We Are*, BIA.GOV (Oct. 30, 2010), <http://www.bia.gov/WhoWeAre/index.htm>.

¹⁸⁹ Tribal Law and Order Act of 2010 § 211; 25 U.S.C §§ 2801, 2802 (2006).

¹⁹⁰ Tribal Law and Order Act of 2010 § 211; 25 U.S.C §§ 2801, 2802 (2006).

¹⁹¹ Tribal Law and Order Act of 2010 § 211(b)(12).

¹⁹² *Id.* § 211(b)(13).

¹⁹³ *Id.* at § 211(b)(14)–(15).

agencies.¹⁹⁴ The TLOA also mandates that a joint plan be submitted to Congress by the DOJ and the BIA within one year of its enactment to arrange for the incarceration of criminals prosecuted in Indian Country.¹⁹⁵

In addition to enhancing and mandating communication between the BIA Office of Justice Services and tribal law enforcement agencies, the bill also requires additional communication between the tribal law enforcement agencies and the DOJ.¹⁹⁶ As many areas of Indian Country rely almost solely upon federal prosecutions,¹⁹⁷ bridging the gap between many tribal law enforcement agencies and their respective United States Attorney's Office is a crucial goal.¹⁹⁸

Responding to statistics that suggest that a troublingly high number of cases are declined by United States Attorney's Offices,¹⁹⁹ the TLOA now mandates a number of new responsibilities for federal prosecutors. Under the TLOA, if a United States Attorney's Office or other federal agency declines or terminates the prosecution of a violation of federal law in Indian Country, the officer must coordinate with the appropriate tribal law enforcement regarding the status of the case and available evidence so as to enable prosecution in an appropriate tribal court.²⁰⁰ In further effort to improve the overall rates of prosecution, the TLOA also requires the Federal Bureau of Investigation to compile data on crimes committed in Indian Country that are not referred for prosecution.²⁰¹ The TLOA also requires that the United States Attorneys submit prosecution declination reports to the Native American Issues Coordinator.²⁰² The Attorney General then must submit the preceding data to Congress on an annual basis for centralized review.²⁰³ As current statistics suggest that a relatively large number of cases are declined by federal prosecutors,²⁰⁴ these provisions will at least make tribal justice officials aware of cases that are not being prosecuted. Additionally, the

¹⁹⁴ *Id.* § 211(b)(16).

¹⁹⁵ *Id.* § 211(f).

¹⁹⁶ *Id.* § 211(b)(14)–(15).

¹⁹⁷ Washburn, *supra* note 77, at 712.

¹⁹⁸ *See supra* note 177.

¹⁹⁹ *See supra* note 69; *see also Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2008).

²⁰⁰ Tribal Law and Order Act of 2010 § 212(a)(1), (3).

²⁰¹ *Id.* § 212(a)(2).

²⁰² *Id.* § 212(a)(4).

²⁰³ *Id.* § 212(b).

²⁰⁴ Department of Justice Officials dispute the need for this provision, maintaining that the United States Attorneys are not declining cases that should be prosecuted in federal court. *See S. Tribal Law and Order Act of 2009, supra* note 132, at 6 (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States).

filing of declination reports will help the federal government better understand why prosecutions are declined, so that strategies can be developed to increase prosecutions.

The TLOA also requires the appointment of a tribal liaison in each United States Attorney's Office that includes Indian Country within its borders to help coordinate prosecutions and develop working relationships with local tribal law enforcement.²⁰⁵ The TLOA charges these liaisons with the responsibility of helping train tribal justice officials in evidence-gathering so tribal law enforcement can better support federal prosecutions.²⁰⁶ Section 213 of the TLOA encourages the appointment and training of attorneys to serve as Special Assistant United States Attorneys to aid in the prosecution of misdemeanors in federal court.²⁰⁷ Moreover, the Act encourages United States Attorney's Offices to increase the number of prosecutions of minor crimes in areas with high levels of crime or high rates of prosecution declination.²⁰⁸ To ensure that there is adequate docket space allocated to these increased prosecutions, the TLOA also charges the affected United States Attorney's Office to coordinate these prosecutions with local federal magistrate and district judges.²⁰⁹

The TLOA makes the Office of Tribal Justice ("OTJ") permanent within the DOJ²¹⁰ and creates a new position, the Native American Issues Coordinator, within the Criminal Division of the DOJ.²¹¹ In addition to the existing responsibilities of the OTJ,²¹² the OTJ is now specifically charged with coordinating tribal policy across all of the offices and divisions in the DOJ as well as serves as the primary point of contact for Indian tribes.²¹³ The Native American Issues Coordinator, on the other hand, is given specific responsibility for coordinating and developing the actual application of federal statutes in Indian Country.²¹⁴ Although this provision could have the effect of pulling some

²⁰⁵ Tribal Law and Order Act of 2010 § 213(b).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* § 214(a).

²¹¹ *See id.* § 214(b).

²¹² According to the DOJ website, the current responsibilities of the OTJ include (1) providing a single point of contact for tribes within the DOJ; (2) promoting uniform DOJ policies; (3) advising department components litigating Native American issues; (4) ensuring communication with tribal leaders; maintaining liaisons with federally recognized tribes; and (5) coordinating with the Office of Legislative Affairs. *OTJ: Role and Responsibilities*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/otj/roleandresponse.htm> (last visited Oct. 30, 2010).

²¹³ Tribal Law and Order Act of 2010 § 214(a).

²¹⁴ *Id.* § 214(b).

manpower out of local United States Attorney's Offices in the short term,²¹⁵ it will help the DOJ develop uniform policies and strategies for the nuts and bolts application of federal statutes in Indian Country in the long term. Overall, the reorganization of Indian affairs within the DOJ will hopefully have the effect of tightening and unifying Indian policy on a national level, while the creation of tribal liaisons and increased use of declination reports will help foster close relationships and cooperation between United States Attorney's Offices and tribes on a local level.

The TLOA largely focuses on the relationship between federal and tribal law enforcement agencies, and it makes little mention of states. There are two significant provisions dealing with the states, however, that could seriously alter the nature of law enforcement in the parts of Indian Country where PL-280 is applicable.²¹⁶

First, to encourage coordination between state, local, and tribal law enforcement agencies, the United States Attorney General is given authority to provide technical and other assistance to those state and local governments that enter into cooperative agreements with tribes for the investigation and prosecution of crimes.²¹⁷ Because one of the major complaints of the states that hold jurisdiction in Indian Country through the operation of PL-280 is the lack of federal funding,²¹⁸ this program could help incentivize local law enforcement cooperation between states and tribes.

Second, the TLOA would serve to lessen the effects of PL-280 in those areas where states have criminal jurisdiction over Indian Country.²¹⁹ The TLOA would allow tribes under state jurisdiction to request to be placed back under federal jurisdiction.²²⁰ Rather than flatly ending state jurisdiction in these areas, the TLOA provides that the state and federal governments would have concurrent jurisdiction over those areas. The DOJ supports this provision²²¹ and it could largely reverse the negative effects of PL-280 in those districts where there is

²¹⁵ See *S. Tribal Law and Order Act of 2009*, *supra* note 132 at 6, 11–12 (statement of Thomas Perrelli, Assoc. Att'y Gen. of the United States) (voicing opposition to the creation of the Office of Indian Country Crime because of the potential to divert needed resources away from the "ground"). In an earlier version of the TLOA, the responsibilities of Native American Issues Coordinator were assigned to an office called the Office of Indian Country Crime. H.R. 1924, 111th Cong. § 106 (2009); S. 797, 111th Cong. § 106 (2009).

²¹⁶ See Tribal Law and Order Act of 2010 §§ 221, 222.

²¹⁷ *Id.* § 222.

²¹⁸ See Goldberg, *supra* note 21, at 538.

²¹⁹ Tribal Law and Order Act of 2010 § 221.

²²⁰ *Id.*

²²¹ *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 12 (statement of Thomas Perrelli, Assoc. Att'y Gen. of the United States).

the least state activity.²²² By contrast, in those areas of Indian Country where state law enforcement and judicial mechanisms are adequately dealing with crime, there is no reason to return to federal jurisdiction. At least in the short term, this provision may prove to be one of the most important in the entire TLOA, as it could potentially place large areas of Indian Country back under federal protection for the first time since 1953.

B. Empowerment of Tribal Law Enforcement

In addition to containing provisions intended to increase coordination of the various law enforcement agencies responsible for safety in Indian Country, the TLOA also contains a host of other provisions designed to empower the justice system and tribal law enforcement agencies.

First, the TLOA focuses on improving the quality of tribal law enforcement agencies by expanding the resources and training opportunities available to them. The TLOA amends the Indian Law Enforcement Reform Act (“ILERA”)²²³ to expand training for tribal law enforcement, allow BIA and tribal officers to attend tribal community colleges or state and tribal police academies, and sets a sixty-day deadline on BIA tribal officer background checks.²²⁴ This provision is potentially helpful in opening up bottlenecks in the training and hiring of tribal law enforcement officers.²²⁵ The TLOA also includes provisions allowing tribal law enforcement agencies access to National Criminal Information Center databases.²²⁶ This section allows Indian tribes to enter information into these databases.²²⁷ The NCIC database provides an interface between the various law enforcement agencies and has been called “the single most important avenue of cooperation among law

²²² *Id.* at 49 (discussing how PL-280 has likely increased crime in areas under state jurisdiction).

²²³ Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990).

²²⁴ Tribal Law and Order Act of 2010 § 231.

²²⁵ Although lack of funding is a major problem, tribal law enforcement agencies and the BIA also face difficulties training hired officers. The BIA, for example, requires that police officer candidates receive training at the Indian Police Academy, located in Artesia, New Mexico. The Indian Police Academy has a low retention rate that creates a bottleneck in the training of officers. As a result, tribal communities are left with considerable unmet needs for trained officers, even after funding for hiring is made available. *See* S. REP. NO. 111-93, at 7, 21–22 (2009).

²²⁶ Tribal Law and Order Act of 2010 § 233. This section of the TLOA amends 28 U.S.C. § 534, placing tribal law enforcement agencies in essentially the same position as state law enforcement. Currently, as written, the TLOA seems to create an affirmative duty on the Attorney General to “ensure” that tribal law enforcement agencies who meet applicable standards have access to these databases. This provision could be read to require a federal investment in technology for tribal police departments. *See id.* § 233(b)(1).

²²⁷ *Id.* § 233.

enforcement agencies.”²²⁸ This increase in access is crucial as many tribal police departments are severely impeded and marginalized by a lack of access to national crime information.²²⁹ Further empowering tribes, the TLOA allows tribal governments to access, use, collect, and share data pursuant to the Violence Against Women and Department of Justice Reauthorization Act of 2005²³⁰ and the Omnibus Crime Control and Safe Streets Act of 1968.²³¹

The TLOA amends the Controlled Substances Act²³² to expand the power of tribal law enforcement officers, authorizing them to “make arrests without warrant for any [federal] offense . . . committed in his presence, or . . . for any felony . . . if he has probable cause to believe that the person to be arrested has committed or is committing a felony . . .”²³³ The TLOA also includes a provision that amends the ILERA, which allows the BIA to authorize Indian police to arrest individuals without a warrant for offenses committed in Indian Country if the offense is a federal crime and if the officer “has probable cause to believe that the person to be arrested has committed, or is committing” the crime.²³⁴ Overall, the TLOA outlines a number of provisions that improve the training and quality of tribal law enforcement agencies, allow access to the NCIC, increase the authority of those departments to

²²⁸ *Tribal Law and Order Act of 2009: Oversight Hearing on H.R. 1924 Before the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) [hereinafter *Oversight Hearing on H.R. 1924*] (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians) (quoting 28 U.S.C. § 534).

²²⁹ *Id.*; WAKELING ET AL., *supra* note 25, at 14, 57.

²³⁰ Tribal Law and Order Act of 2010 § 251(a); *see* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified at 28 U.S.C. § 534 (2006)).

²³¹ Tribal Law and Order Act of 2010 § 251(b); *see* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3732 (2006)).

²³² Tribal Law and Order Act of 2010 § 232(d); *see* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 878(a) (2006)).

²³³ Tribal Law and Order Act of 2010 § 232(d); 21 U.S.C. § 878(a)(3) (2006).

²³⁴ Tribal Law and Order Act of 2010 § 211(c); 25 U.S.C. § 2803 (2006). This expands the authority of BIA officers enormously, as they previously only had authority to arrest without a warrant if (1) the offense was committed in their presence, (2) the offense was a felony and the officer had reasonable grounds to believe the arrestee committed it, or (3) the offense was of a limited class of misdemeanors, including domestic and dating violence, stalking, or the violation of protective orders. 25 U.S.C. § 2803 (2006). Earlier versions of the TLOA repeated the “reasonable grounds” standard from the ILERA. *See* H.R. 1924, 111th Cong. § 101(c) (2009); S. 797, 111th Cong. § 101(c) (2009).

This “reasonable grounds” standard would likely have been unconstitutional for violating the “probable cause” standard for warrantless arrests under the Fourth Amendment as set forth by the Supreme Court in *Atwater v. City of Lago Vista*. *See* 532 U.S. 318, 354 (2001) (“[T]he standard of probable cause ‘applie[s] to all arrests’” (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979))).

make arrests, and more generally provide for the safety and well-being of those individuals living in Indian Country.

Additionally, the TLOA amends the Indian Self-Determination and Education Assistance Act²³⁵ to create the Indian Law Enforcement Foundation, a charitable, federally chartered corporation.²³⁶ The Foundation is charged with “encourag[ing], accept[ing], and administer[ing]” charitable gifts and donations for the benefit of public safety and justice services in American Indian or Alaska Native communities.²³⁷ The Foundation is also responsible for helping the Office of Justice Services in the BIA and tribal governments in administering and applying funds as well as providing educational services to benefit public safety.²³⁸

In one of its most important and controversial provisions,²³⁹ the TLOA significantly increases the sentencing authority of tribal courts.²⁴⁰ The TLOA amends the ICRA to increase the maximum sentence that tribal courts may impose from one to three years, and it increases the maximum fine for each offense from \$5,000 to \$15,000.²⁴¹ This provision was enacted in direct response to the concerns that tribal courts were being severely hampered by the inability to punish crimes with proportionate sentences.²⁴² For example, then-U.S. Attorney General Janet Reno stated that “[t]he lack of a system of graduated sanctions through tribal court . . . directly contributes to the escalation of adult

²³⁵ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450–58 (2006)).

²³⁶ Tribal Law and Order Act of 2010 § 231(c).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See, e.g., *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 13 (statement of Thomas J. Perrelli, Assoc. Att’y Gen. of the United States) (discussing possible negative effects of this provision).

²⁴⁰ Tribal Law and Order Act of 2010 § 234(a).

²⁴¹ Compare *id.*, with 25 U.S.C. § 1302(7) (2006).

²⁴² See, e.g., *Oversight Hearing on H.R. 1924*, *supra* note 228, at 5 (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians) (discussing how tribal courts are responsible for prosecuting many felonies but are hampered by the inability to sentence adequately); *Tribal Courts*, *supra* note 76, at 33 (statement of Theresa M. Pouley, J. of Tulalip Tribal Court and President of Northwest Tribal Court JJ. Association) (same); see also S. REP. NO. 111-93, at 16 (2009) (“Facts have changed dramatically in the past twenty years. Tribal courts are increasingly trying violent offenses and tribal jails are holding more violent offenders. In testimony before the Committee, one tribal prosecutor stated that ‘I have a jury trial that is scheduled on a murder, a homicide case on the end of this month[. . .]. We just finished a trial on a juvenile who was convicted of homicide in our court.’”) (citing *Tribal Courts*, *supra* note 76, at 82 (statement of Dorma L. Sahneyah, Chief Prosecutor, Hopi Tribe)).

and juvenile criminal activity.”²⁴³ To protect due process rights, however, the TLOA amends the ICRA further, requiring that if a tribal court sentences an individual to more than one year’s imprisonment, the court may not deny the defendant the benefit of legal counsel, provided at the expense of the tribe,²⁴⁴ and that the judge presiding over the proceeding be admitted to practice law.²⁴⁵ In an act of caution, Congress added a long-term safeguard to the provision creating the increased sentencing authority: the effectiveness of the increased sentencing authority will be evaluated in four years and may then be “discontinued, enhanced, or maintained.”²⁴⁶ Also worth noting is the fact that the TLOA leaves unclear the ability of tribal courts to sentence defendants to multiple terms of imprisonment for separate offenses arising from the same criminal conduct.²⁴⁷

Giving the increased sentencing authority even more bite, tribal courts exercising this new authority under the TLOA may imprison defendants in tribal correction centers or take advantage of federal facilities as part of a Bureau of Prisons tribal prisoner pilot program that will last for four years.²⁴⁸ The pilot program allows tribal courts to request confinement of individuals convicted of violent crimes whose term of imprisonment is one year or more; these inmates will be imprisoned at the expense of the federal government.²⁴⁹ A cap of one hundred tribal offenders at any one time, however, is imposed on this

²⁴³ *Department of Justice/Department of the Interior Tribal Justice Initiatives: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. 55 (1998) (statement of Janet Reno, Att’y Gen. of the United States).

²⁴⁴ Tribal Law and Order Act of 2010 § 234(a). It is currently unclear what percentage of tribes will be able to afford to provide legal counsel to criminal defendants. Potentially, the cost of counsel may inhibit the ability of tribes to fully exercise the new sentencing authority granted in Section 234 of the TLOA. See Rob Capriccioso, *Tribal Law and Order Act to Become Law at Cost to Tribes*, INDIAN COUNTRY TODAY (July 22, 2010), <http://www.indiancountrytoday.com/home/content/Tribal-Law-and-Order-Act-to-become-law-at-cost-to-tribes-99016714.html>. In the future, it may be necessary for the federal government either to subsidize or to pay for the cost of defense counsel for needy tribes.

²⁴⁵ Tribal Law and Order Act of 2010 § 234(a).

²⁴⁶ *Id.* § 234(b)(2). This long-term safeguard did not exist in earlier versions of the TLOA in either the House or the Senate. See H.R. 1924, 111th Cong. § 304 (2009); S. 797, 111th Cong. § 304 (2009).

²⁴⁷ For example, in *Spears v. Red Lake Band of Chippewa Indians*, the court held that different crimes committed during a single incident constituted only one offense under the ICRA. 363 F. Supp. 2d 1176, 1180 (D. Minn. 2005) (citing U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 3D, Introductory Commentary ¶¶ 3–4 (2004)). This interpretation of the ICRA seriously curtails the sentencing authority of tribal courts. The TLOA simply defines an offense as “a violation of a criminal law,” leaving the issue unresolved. Tribal Law and Order Act of 2010 § 234(a).

²⁴⁸ Tribal Law and Order Act of 2010 § 234(c)(6).

²⁴⁹ *Id.* § 234(a)(1).

program.²⁵⁰ Recent studies have shown that many tribal jails are severely overcrowded, understaffed, and incapable of handling the prisoners for whom they are already responsible.²⁵¹ Thus the TLOA helps to ensure that individuals convicted in tribal court are imprisoned and that inmates are housed in adequate facilities. On the same note, the TLOA makes provisions to amend the Violent Crime Control and Law Enforcement Act of 1994 to provide for the construction of additional detention facilities in Indian Country.²⁵²

In addition to these provisions, the TLOA includes the reauthorization of a host of various law enforcement or justice-related programs. The programs affected by the TLOA are wide ranging; they include programs for combating alcohol and substance abuse in Indian Country,²⁵³ increased training of tribal law enforcement in the investigation and prosecution of narcotics-related offenses,²⁵⁴ the reauthorization of the Indian Tribal Justice Act,²⁵⁵ the reauthorization of the Indian Tribal Justice Technical and Legal Assistance Act of 2000,²⁵⁶ and amendments to the Juvenile Justice and Delinquency Prevention Act of 1974 to provide for additional grants to Indian tribes.²⁵⁷ The TLOA also reauthorizes the DOJ Tribal Community Oriented Policing Services program, which will provide long-term grants for hiring and training additional law enforcement officers as well as for purchasing

²⁵⁰ *Id.* § 234(c)(2)(D).

²⁵¹ WAKELING ET AL., *supra* note 25, at 26. Many tribal jails are overcrowded and in disrepair; jail operations also lack sufficient training, staffing, and funding. Due to these problems, judges may be forced to release offenders early, and the poor conditions place the safety of both officers and inmates at risk. S. REP. NO. 111-93, at 8 (2009).

²⁵² Tribal Law and Order Act of 2010 § 244(b)(3); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1, 108 Stat. 1796, 1796 (codified at 42 U.S.C. § 13709(b) (2006)).

²⁵³ Tribal Law and Order Act of 2010 § 241. This provision reauthorizes the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-137 (codified at 25 U.S.C. § 2401-03 (2006)).

²⁵⁴ Tribal Law and Order Act of 2010 § 241(f).

²⁵⁵ *Id.* § 242; *see* Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended in scattered sections of 25 U.S.C.). In general, the Indian Tribal Justice Act provides funding and financial assistance for expenses related to the operation of tribal court systems. Indian Tribal Justice Act § 101(c).

²⁵⁶ Tribal Law and Order Act of 2010 § 242(b); *see* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (2000) (codified as amended in scattered sections of 25 U.S.C.). This Act also provides for grants and financial assistance to the tribal justice system. Indian Tribal Justice Technical Assistance Act §§ 101-03.

²⁵⁷ Tribal Law and Order Act of 2010 § 246. The Juvenile Justice and Delinquency Prevention Act of 1974 is codified at 42 U.S.C. § 5783 (2006).

equipments, such as computers and vehicles.²⁵⁸ Finally, with an eye to the future, the TLOA creates an Indian Law and Order Commission, which is tasked with the responsibility of studying and making recommendations to the President and Congress on a host of issues related to criminal law in Indian Country.²⁵⁹

C. Special Provisions for Crimes Against Women

Importantly, the TLOA includes provisions specifically designed to help combat the much-publicized epidemic of violence against women in Indian Country.²⁶⁰ The TLOA first provides that additional training programs be put in place to help tribal law enforcement deal with crimes of domestic and sexual violence.²⁶¹ The TLOA amends the ILERA²⁶² and provides that the newly created Office of Justice Services be responsible for providing training in interviewing victims of domestic and sexual violence, preserving evidence in cases of sexual violence, and presenting evidence to federal and tribal prosecutors to help increase conviction rates.²⁶³ Additional training in these areas is sorely needed; current evidence suggests that tribal law enforcement agencies lack both the means and the expertise to preserve the physical evidence often needed to prosecute sexual violence cases adequately.²⁶⁴ In a similar vein, the TLOA further amends the ILERA to provide for the creation of standardized sexual assault polices and protocols in Indian Country by the Director of Indian Health Services.²⁶⁵ Additionally, the Act charges the Comptroller General of the United States with conducting a study of the health services facilities in Indian reservations and Alaska Native villages to determine their ability to “collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution.”²⁶⁶ Upon collecting the data, the Comptroller must

²⁵⁸ Tribal Law and Order Act of 2010 § 243(3); U.S. DEP’T OF JUSTICE, FISCAL YEAR 2011 BUDGET REQUEST: INDIAN COUNTRY PUBLIC SAFETY INITIATIVES 1–2, *available at* <http://www.justice.gov/jmd/2011factsheets/pdf/indian-country.pdf>.

²⁵⁹ Tribal Law and Order Act of 2010 § 235.

²⁶⁰ *Id.* §§ 261–66.

²⁶¹ *Id.* § 262.

²⁶² 25 U.S.C. § 2802 (2006); Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990).

²⁶³ Tribal Law and Order Act of 2010 §§ 211(a)–(b), 262. The Office of Justice Services will be located in the Bureau of Indian Affairs. Tribal Law and Order Act § 211(b).

²⁶⁴ Amnesty Int’l, *supra* note 28, at 9.

²⁶⁵ Tribal Law and Order Act of 2010 § 265. “This section was adopted in response to findings that [thirty percent] of [Indian Health Services] facilities did not have protocols in place for emergency services in cases of sexual violence.” S. REP. NO. 111-93, at 21 (2009).

²⁶⁶ Tribal Law and Order Act of 2010 § 266(a).

also make a report to Congress with recommendations for improving these services.²⁶⁷

In an effort to coordinate prosecutions of defendants accused of committing rape or sexual assault, the TLOA amends the ILERA to provide that federal employees will testify upon subpoena or request in cases of rape or sexual assault in which they have gained knowledge of the assault within the scope of their official duties.²⁶⁸ Although approval is not guaranteed for all requests, the TLOA provides that the request shall not be denied unless it violates the Department's policy of impartiality, and an automatic approval is provided if the request is not acted upon within thirty days.²⁶⁹ This provision could be very important in the prosecution of many sex crimes, as prosecutors currently struggle to acquire reliable testimony.²⁷⁰ With less reliance on Indian witnesses, who are often scared to testify in an intimidating courtroom several hours from home,²⁷¹ prosecutors will be able to secure additional convictions and may be willing to take on a higher volume of Indian rape cases, helping to reduce overall prosecution declination rates.

III. SHORTCOMINGS OF THE TLOA AND LEGISLATIVE PROPOSALS

Clearly, the TLOA is a major step in the right direction. The Act sets forth a whole host of related provisions designed to combat the epidemic of crime and violence in Indian Country. Among the most significant provisions are increases in funding for and support of tribal law enforcement and justice systems, increased sentencing authority of tribal courts, establishment of potential concurrent jurisdiction in PL-280 states, and reorganization and increase of funding within the Department of Justice—both in Washington and within individual United States Attorney's Offices.²⁷² Although the Act does not overhaul or even retool the highly dysfunctional Indian criminal justice system, it does focus immediate attention on some of the most defective and damaging problems. The TLOA also has important symbolic value: by gathering such a large number of provisions in one place, Congress is making a clear statement that the nation is finally serious about the safety of individuals living in Indian Country. Indeed, the Act has been

²⁶⁷ *Id.* § 266(b).

²⁶⁸ *Id.* § 263; 25 U.S.C. §§ 2801–09 (2006).

²⁶⁹ Tribal Law and Order Act of 2010 § 263.

²⁷⁰ *See* Washburn, *supra* note 77, at 711–12, 736–38. This provision was adopted in response to reports that prosecutors have trouble obtaining testimony from BIA police or Indian Health Services in sexual violence prosecutions. S. REP. NO. 111-93, at 21 (2009).

²⁷¹ Washburn, *supra* note 77, at 710–13, 737.

²⁷² *See supra* Part II.

met with praise and support from a number of different sources from across the political, social, and religious spectra.²⁷³

Although a significant and potentially watershed act, the TLOA does have shortcomings that need to be addressed in future legislation. Congress will ideally use the TLOA as a springboard and will accordingly craft additional legislation that responds to the needs of tribal, state, and federal law enforcement agencies. The TLOA itself makes provisions for this additional future action by creating the Indian Law and Order Commission.²⁷⁴ The Commission is charged with conducting a “comprehensive study of law enforcement and criminal justice in tribal communities” and “[n]ot later than 2 years after the date of enactment of this Act . . . submit[ting] to the President and Congress a report that contains . . . the recommendations of the Commission for

²⁷³ See, e.g., Press Release, S. Comm. on Indian Affairs, Dorgan Welcomes Obama Endorsement of Tribal Law and Order Act (Nov. 2, 2009); *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 9 (statement of Thomas J. Perrelli, Assoc. Att’y Gen. of the United States); *Oversight Hearing on H.R. 1924*, *supra* note 228, at 2 (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians); *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 49 (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California); Resolution to Support the Passage and Full Funding of “Tribal Law and Order Act,” National Indian Gaming Association (Apr. 15, 2009), available at http://www.indiangaming.org/info/alerts/Tribal_Law-Order_Act.pdf; Press Release, S. Comm. on Indian Affairs, Legislation Gives Boost to Law & Order in Indian Country, (July 23, 2008) (Senator Lisa Murkowski (R-AK) praising the TLOA); *Amnesty International Commends President Obama for Signing Tribal Law and Order Act, Addressing Rampant Violence Against Native Peoples*, AMNESTY INT’L USA (July 29, 2010), <http://www.amnestyusa.org/document.php?id=ENGUSA20100729001>.

The Senate Committee on Indian Affairs received letters of support from a number of different sources, including the National Congress of American Indians, the American Bar Association, Amnesty International U.S.A., the Friends Committee on National Legislation, the Family Violence Prevention Fund, Mending the Sacred Hoop, the New York State Coalition Against Sexual Assault, Strong Hearted Native Women’s Coalition, and Qualla Women’s Justice Alliance. See S. REP. NO. 111-93, at 5 (2009); see also Letter from the Coalition of Bar Associations of Color in Support for Tribal Law and Order Act (May 26, 2010) (includes signatures of support from the Presidents of the Hispanic National Bar Association, National Bar Association, National Asian Pacific American Bar Association, and National Native American Bar Association); Letter from the American Bar Association in Support for Tribal Law and Order Act of 2009 to Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs and John Barraso, Ranking Member, S. Comm. on Indian Affairs (July 17, 2000); Letter from the Friends Committee on National Legislation in Support for the Tribal Law and Order Act (Apr. 26, 2010) (signed by religious groups and denominations, including the Episcopal Church, the Evangelical Lutheran Church in America, Franciscan Action Network, Friends Committee on National Legislation (Quaker), Islamic Society of North America, National Council of Churches of Christ in the USA, the Presbyterian Church (U.S.A.) Washington Office, the Unitarian Universalist Association of Congregations, National Ministries, American Baptist Churches USA, United Church of Christ, Justice and Witness Ministries, United Methodist Church, and General Board of Church and Society).

²⁷⁴ Tribal Law and Order Act of 2010 § 235.

such legislative and administrative actions as the Commission considers to be appropriate.”²⁷⁵

In particular, future legislation should begin allocating additional authority to tribal courts and police. The TLOA is largely focused on increasing the federal presence in Indian Country²⁷⁶—which will be vitally important in the short term—but in the long term, increased involvement of tribal authorities is necessary. Allocating significant authority to the Indian tribes through future legislation could potentially serve to rewrite the Indian criminal justice system entirely, which is the best solution to the problem if done responsibly. This two-step process would seize upon two of the most fundamental strands of federal Indian law: the long-standing federal trust responsibility and the more recent self-determination doctrine. The TLOA would in the near future primarily take advantage of the trust responsibility to fashion federal remedies to the crime problem,²⁷⁷ while in the long term, legislation should shift responsibility to tribal authorities in accordance with the more modern self-determination doctrine.

In this vein, there are several areas that Congress most pressingly needs to address. They include the following: (1) a clear Congressional assertion of concurrent tribal jurisdiction over major crimes in PL-280 states, (2) increased sentencing authority for tribal courts, and (3) a legislative overturning of *Oliphant* to provide tribal jurisdiction over non-Indians committing crimes in Indian Country. Each of these proposals will be considered in turn, and will hopefully initiate further discourse on the future needs of law and justice in Indian Country. Finally, tribal courts and governments will never be true partners without adequate federal funding. Adequate funding of tribal law enforcement and court systems will be essential to the success of any provision, in the TLOA or elsewhere, intended to make Indian Country a safer place.

A. Increased Sentencing Authority of Tribal Courts

By increasing the sentencing authority of tribal courts,²⁷⁸ the TLOA significantly expands the ability of tribal justice systems to provide proportional punishments and deterrence.²⁷⁹ Importantly, the TLOA now allows for the adequate punishment of many crimes that would be

²⁷⁵ *Id.*

²⁷⁶ *See supra* Part II.

²⁷⁷ *See supra* Part II.

²⁷⁸ *See supra* pp. 172–74.

²⁷⁹ *See supra* pp. 151–53 (discussing the former sentencing limitation of one year’s imprisonment and a \$5,000 fine under the ICRA).

classified as felonies under federal guidelines.²⁸⁰ Furthermore, as tribal and federal courts are separate sovereigns, individuals who commit crimes in Indian Country could now potentially face two significant prison sentences.²⁸¹

A possible future legislative development would be the expansion of sentencing authority in tribal courts beyond the current three-year limit. Many of the major objections to tribal courts' increased sentencing authority currently center on due process concerns.²⁸² Although tribal courts will likely remain unique in the United States as they are often influenced by traditional tribal values,²⁸³ the entire Bill of Rights, with the exception of the Sixth Amendment right to counsel, was applied against tribes through ICRA prior to the TLOA.²⁸⁴ Additionally, under the TLOA, the Sixth Amendment right to counsel is applied in all cases in which sentences in excess of one year are imposed.²⁸⁵ If sufficient funding is allocated to ensure indigent right to counsel, the

²⁸⁰ In general, federal law defines a felony as an offense that is not otherwise classified in which the maximum term of imprisonment is more than one year. See 18 U.S.C. § 3559 (2006).

An important ambiguity in the TLOA is whether tribal courts are allowed to sentence defendants to multiple sentences for separate offenses arising from the same conduct. See Tribal Law and Order Act of 2010 § 234. Future legislation should also amend the TLOA to make clear that tribal courts are to not be inhibited by overly broad interpretations of the term "offense."

²⁸¹ In *United States v. Lara*, the Supreme Court held that tribal prosecutions derived from the tribe's separate sovereignty, not federal power, and therefore the Double Jeopardy Clause did not prohibit additional federal prosecution for discrete federal offenses arising from the same incident. 541 U.S. 193, 210 (2004) (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985)).

A topic that is not mentioned in the TLOA is whether defendants could potentially face three prosecutions in a PL-280 state where a tribe also consents to federal jurisdiction. In theory, the separate sovereignty rationale of *Lara* would allow for the three prosecutions.

²⁸² See, e.g., *Duro v. Reina*, 495 U.S. 676, 709–10 (1990) (Brennan, J., dissenting); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) ("[D]efendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical."); Will Trachman, Comment, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CALIF. L. REV. 847, 876–87 (2005); Peter W. Birkett, Note, *Indian Tribal Courts and Procedural Due Process: A Different Standard?*, 49 IND. L.J. 721 (1974); Ted Wills, Note, *De Novo Review: An Alternative to State and Federal Court Jurisdiction of Non-Indian Minor Crimes on Indian Land*, 17 AM. INDIAN L. REV. 309, 316–17 (1992); Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1419 (1985) (describing due process concerns in tribal courts).

²⁸³ See Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3 (1997).

²⁸⁴ 25 U.S.C. § 1302 (2006); see also Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2199 (2000).

²⁸⁵ Tribal Law and Order Act of 2010 § 234.

constitutional protections available in tribal courts will largely be identical to those in federal and state courts. As an additional safeguard, the TLOA requires that individuals who preside over sentencing in excess of one year be admitted to practice law, ensuring a level of familiarity with American legal norms.²⁸⁶

It is unlikely that tribal courts will be equipped (or even want) to handle the full panoply of criminal offenses that state courts currently must hear.²⁸⁷ Willing tribes could, however, develop initiatives based on particular local concerns²⁸⁸—selecting crimes that are the most troublesome locally—and develop tribal legislation that would allow for the sentencing of individuals convicted of crimes in excess of three years where appropriate. To ensure that sufficient procedural safeguards are present in the courts that implement this program, a robust federal approval process could be created.

There are many different ways that this approval process could be structured. One possibility is a system in which the participating tribes would submit an application to a newly created federal agency, potentially within either the BIA or DOJ,²⁸⁹ requesting permission to begin sentencing defendants in excess of three years for a particular offense or offenses. This agency would consider the need for additional punishments based on the local needs of the tribe and would also assess the ability of the tribe to prosecute these offenses adequately and fairly. Considerations could include the level of sophistication of the tribal court system, prior experience trying similar crimes, arrangements for the incarceration of defendants, and the general skill level of the tribal law enforcement agencies who would be investigating the crimes. If the tribe passes the review process, it could then begin sentencing in excess of three years for the approved offenses. This tribe-specific review process would allow those tribes with the most developed judiciaries to expand their justice systems considerably. The process would also be realistic, recognizing that many tribal courts are currently underdeveloped and are not prepared to exercise full enforcement powers. In the long term,

²⁸⁶ *Id.*

²⁸⁷ See Cunningham, *supra* note 284, at 2205; Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 724–25 (2006) (noting that many tribes would be unwilling to exercise significant criminal jurisdiction due to a lack of resources or other concerns).

²⁸⁸ See O'Connor, *supra* note 283, at 2–3 (describing a similar process for other issues, such as issues related to land, oil, timber, and fish).

²⁸⁹ Both the BIA and DOJ already deal with a number of complex issues related to tribal courts and law, such as the Tribal Courts Assistance Program, which provides court-related support and assistance to Native American communities to help develop and enhance tribal judicial systems. BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, TRIBAL COURTS ASSISTANCE PROGRAM FACT SHEET 1 (2008).

however, this process would treat the tribes with respect as potential full partners, eventually turning over a great deal of local criminal enforcement to them.²⁹⁰

Additionally, as part of this expanded sentencing authority, Congress should also make clear that neither the Major Crimes Act²⁹¹ nor PL-280²⁹² is intended to divest tribal courts of concurrent jurisdiction over the crimes covered by these statutes. Although the best interpretations of both of these Acts currently reach that conclusion, enough confusion has been created in both instances to warrant a clear Congressional statement on point.²⁹³ Importantly, the increased authority of tribal courts to impose sentences—both in the current proposal and the TLOA—would be gutted if courts interpreted either act as divesting tribal courts of significant subject matter jurisdiction.

B. Tribal Jurisdiction over Non-Indians Committing Crimes in Indian Country

A major limitation on tribal courts that still exists under the TLOA is the jurisdictional limitation of *Oliphant*.²⁹⁴ The holding of this decision is one of the major reasons crimes are currently under-prosecuted in Indian Country.²⁹⁵ If a long-term remedy is ever to be fashioned, the jurisdiction of tribal courts must be expanded to include non-Indians who commit crimes in Indian Country.²⁹⁶

The current arrangement creates some interesting—and unjust— anomalies. For example, if a Native American commits a crime in Indian Country, he or she can potentially face two significant prosecutions.²⁹⁷ If,

²⁹⁰ See B. J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in the Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 478–79 (1998) (describing the increased respect and integration of tribal courts into the national judicial system).

²⁹¹ See *supra* pp. 151–53.

²⁹² See *supra* pp. 155–56.

²⁹³ See *supra* pp. 151–57.

²⁹⁴ See *supra* Part I.B (discussing jurisdiction limitation of tribal courts to try only Indians).

²⁹⁵ See *supra* Part I.B (discussing the effects of *Oliphant* on criminal jurisdiction in Indian Country); see also Amnesty Int'l, *supra* note 28, at 27–28 (describing the jurisdictional complications created by *Oliphant* and PL-280).

²⁹⁶ For a well-considered similar proposal made prior to the proposal of the TLOA, see Quasius, *supra* note 62, at 1924–35.

²⁹⁷ The Indian could be charged and sentenced to a sentence of one year by the tribal court, and the Indian can also be charged and sentenced in state or federal court. See *United States v. Lara*, 541 U.S. 193, 210 (2004). Another unjust anomaly in jurisdiction was caused by the *Duro-Fix*. Under the *Duro-Fix* (an attempt to fix the ICRA), non-member Indians are potentially subjected to the jurisdiction of all tribal courts, whereas other individuals are not. See 25 U.S.C. § 1301 (2006). In reality, is it any more or less objectionable for a member of the Oneida Indian Nation in New York to be tried before a

however, the same crime was committed by a non-Indian in Indian Country, this individual can only be prosecuted in state or federal court once (depending upon the application of PL-280).²⁹⁸ Not only is this double standard unfair, but it is also incredibly dangerous because current studies indicate that many of the crimes committed in Indian Country are committed by non-Indians.²⁹⁹ In these situations, tribes must rely entirely on state and federal prosecutors, often hundreds of miles away, to enforce criminal law.³⁰⁰ This is a significant gap in jurisdiction that, not surprisingly, leads to under-enforcement of criminal law in Indian Country.³⁰¹

This arrangement also leaves the individuals most deeply affected by the rampant gang, drug, and sexual violence committed in Indian Country—the local residents—nearly powerless to prosecute, or even arrest, many of the individuals committing those crimes.³⁰² A rough analogy makes the problem very clear. Imagine if prosecutors in New Jersey were responsible for prosecuting all crimes committed in New York by non-New York residents. This arrangement would not work because it would likely result in non-New York residents committing crimes in New York with near impunity. Similarly, it should not be surprising that the level of crime in Indian Country “has reached crisis proportions.”³⁰³

Thus if this troubling agency dilemma is ever going to be resolved, it will be necessary to allow tribal courts to try non-Indians who commit crimes in Indian Country. Congressional legislation in this area would need to overrule the 1978 Supreme Court decision of *Oliphant*, which stripped Indian tribes of criminal jurisdiction over non-Indians.³⁰⁴ The precedent for this sort of measure is not difficult to find. In 1991 Congress amended the ICRA³⁰⁵ in the now-famous “*Duro-Fix*” to

Hualapai Tribal court in Arizona than it would be for any other citizen of the state of New York to be tried by a distant Hualapai court?

²⁹⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

²⁹⁹ See *supra* Part I.A.

³⁰⁰ See Washburn, *supra* note 77, at 711–12 (describing the distance between many reservations and the nearest district court).

³⁰¹ See *supra* Part I.B.

³⁰² See Quasius, *supra* note 62, at 1903–04.

³⁰³ *Oversight of the U.S. Dep’t of Justice*, *supra* note 7, at 16.

³⁰⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

³⁰⁵ 25 U.S.C. § 1301 (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 by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . .

Id. § 1301(2).

authorize tribes to try all Indians, including non-members, for violations of criminal law.³⁰⁶ This “fix” was upheld as constitutional in *United States v. Lara* on the grounds that the tribe had the authority to prosecute non-member Indians because of its “inherent tribal authority.”³⁰⁷ The holding in *Lara*³⁰⁸ suggests that similar legislative action amending the ICRA to read “all persons” would similarly be upheld as Constitutional by federal courts.³⁰⁹

Overturing the Supreme Court’s decision in *Oliphant* would be a highly controversial measure. To many individuals, the idea of potentially being tried and sentenced in a tribal court is quite objectionable.³¹⁰ Most objections would not likely be based on racist notions of Indian inferiority, but rather on valid concerns that tribal courts are currently unable to provide sufficient constitutional and procedural safeguards, despite their best intentions to do so.³¹¹ To ensure that proper procedure is given in tribal courts, a conditional approval process for jurisdiction over all non-members could be instituted—similar in form to that described in Part III.A. The approval could consider a wide variety of factors, but would be focused on the ability of the tribal court to adjudicate criminal cases fairly at a standard that meets federal constitutional norms. The areas of inquiry could include, but should not be limited to, full compliance with the ICRA;³¹² compliance with Fourth Amendment search and seizure rules by tribal law enforcement; compliance with Fifth and Sixth Amendment procedural protections, including *Miranda*;³¹³ the inclusion of non-Indians in jury pools;³¹⁴ the competence and independence of judges; and the development of appellate review processes. It is possible that no

³⁰⁶ This amendment to the ICRA overruled *Duro v. Reina*, 495 U.S. 676 (1990).

³⁰⁷ *United States v. Lara*, 541 U.S. 193, 210 (2004).

³⁰⁸ *Id.*

³⁰⁹ For example, the ICRA would read, upon amendment, that “powers of self-government’ means . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all *persons*.” See 25 U.S.C. § 1301 (2006) (italicized text representing proposed amendment).

³¹⁰ 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, 573–80 (2009) (raising potential objections); John T. Tutterow, Note, *Federal Review of Tribal Court Decisions: In Search of a Standard or a Solution for the Problem of Tribal Court Review by the Federal Courts*, 23 OKLA. CITY U. L. REV. 459, 484 (1998) (discussing potential points of objection to being tried in a tribal court as a non-Indian).

³¹¹ See *supra* pp. 179–80 (discussing Due Process and Sixth Amendment right to counsel concerns).

³¹² 25 U.S.C. §§ 1301–41 (2006).

³¹³ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

³¹⁴ The Supreme Court in *Oliphant* was concerned that non-Indians were not permitted to serve on the juries of the Suquamish court system. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.4 (1978).

tribal court would currently be approved to try non-members; however, an opt-in process would encourage the development of America's third sovereign, and hopefully, in the future, a large number of tribal courts will be able to prosecute those who commit crimes on their territory, regardless of the background of the defendant. Additionally, as tribal courts become less reliant on federal prosecutors, United States Attorney's Offices could focus on prosecuting the crimes occurring in Indian Country that are more within their expertise (such as organized crime, fraud, and corruption), rather than on the minor offenses that they currently must also prosecute.

An important point worth noting here is that tribal court systems, even after the administrative approval to try non-Indian defendants, would not exist entirely independent of federal courts. Rather, the basic framework of federalism will allow federal courts to serve as partners, continuing the learning and maturation process of tribal courts.³¹⁵ Indeed, federalism already serves a similar role between the federal and state systems, as the separate sovereigns learn from each other.³¹⁶ For example, under ICRA, defendants convicted in tribal court may file a *habeas corpus* petition to an appropriate federal district court.³¹⁷ Although standards of review for *habeas* petitions are not favorable, they serve as a backstop for tribal courts as they learn to apply criminal law fairly. Other safeguards could be put into place by Congress, granting jurisdiction to federal courts over tribal judgments. These could include an appellate review process for tribal decisions on issues of federal law, either by the federal Courts of Appeals or the United States Supreme Court.³¹⁸

³¹⁵ For three engaging and thought-provoking discussions of federalism as it would be applied to tribal courts, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Jones, *supra* note 290; Frank Pommersheim, "Our Federalism" in *the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000).

³¹⁶ O'Connor, *supra* note 283, at 5–6.

³¹⁷ 25 U.S.C. § 1303 (2006).

³¹⁸ There is no accepted norm for when a federal court may exercise appellate jurisdiction over a decision of a tribal court. Currently, federal courts assume jurisdiction to review determinations by tribal courts of tribal jurisdiction. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985); see also Tutterow, *supra* note 310, at 459–60. As federal courts are courts of limited jurisdiction, however, this sort of appellate review of tribal court determinations may not be constitutional; if tribal courts began hearing larger numbers of cases, a clearer review process would need to be set forth by Congress to ensure constitutional compliance.

CONCLUSION

A number of recent studies and articles have made it painfully clear that there is a crime crisis in much of Indian Country.³¹⁹ Indian women are raped and abused at rates far exceeding the national rate,³²⁰ and gangs are becoming an unfortunate staple of Indian life.³²¹ A lack of funding and the current confusing patchwork of criminal jurisdiction in Indian Country are hampering efforts to counter this significant threat to the well-being of many Native Americans.³²²

In a response that could serve to provide immediate support to the criminal justice system in Indian Country, Congress twice proposed, and finally passed, the Tribal Law and Order Act. The TLOA was signed into law by President Obama on July 29, 2010.³²³ Among the most important reforms proposed in the TLOA are the increasing of tribal court authority to sentence criminal defendants to three years' imprisonment; concurrent federal and state jurisdiction in PL-280 states upon tribal consent; and substantial increases in the resources available for combating crime on federal, state, and tribal levels.³²⁴

Although an extremely important reform, the TLOA is merely a first step. It focuses attention on the most damaging and publicized problems, but does not fundamentally rewrite how crime will be fought in Indian Country. If a long-term solution is to be reached, Congress must seriously consider both further increasing the sentencing authority of tribal courts and legislatively overturning the jurisdictional limitations imposed on tribal courts by the Supreme Court in *Oliphant v. Suquamish Indian Tribe*.³²⁵ Finally, Congress must also ensure that tribal law enforcement agencies and courts are adequately funded.³²⁶ The current crime problem in Indian Country is very severe; solving it will require a sustained response that both increases federal involvement in the short term, as is proposed in the TLOA, and empowers tribal justice systems as well as law enforcement in the long term.³²⁷

³¹⁹ See *supra* Part I.A.

³²⁰ See *supra* Part I.A.2.

³²¹ See *supra* Part I.A.1.

³²² See *supra* Part I.B, I.C.

³²³ See *supra* note 168.

³²⁴ See *supra* Part II.

³²⁵ See *supra* Part III.A.

³²⁶ See *supra* p. 178.

³²⁷ See *supra* Part III.