

THE FAILURE OF THE TRIBAL LAW AND ORDER ACT OF 2010 TO END THE RAPE OF AMERICAN INDIAN WOMEN

INTRODUCTION: THE VULNERABILITY OF AMERICAN INDIAN WOMEN

In the United States, the crime of rape is most prevalent among American Indian and Alaskan Native communities.¹ Studies have shown that women in these communities are two-and-a-half times more likely to be raped or sexually assaulted when compared with women in the general United States population.² However, due to issues of underreporting and social stigma, these statistics fail to fully and accurately depict the situation.³

Consider the story of Leslie Ironroad, as reported by National Public Radio in 2007.⁴ Ironroad moved across the Standing Rock Reservation in South Dakota to a small town to live with her friend Rhea Archambault.⁵ One night, when attending a party, Ironroad was brutally beaten and raped.⁶ She never made it home.⁷ Archambault eventually found Ironroad at a local hospital, covered in bruises.⁸ She had ingested a considerable amount of diabetes medicine in the hope that if she were unconscious, the men would leave her alone.⁹ Her terrible experience left her blind and with little ability to communicate.¹⁰ When the police came for her statement, she had to scratch it out on a tablet laid across her stomach.¹¹ One week later, Leslie Ironroad died

1. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2 (2007).

2. *Id.*; Cf. Ronet Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUSTL. & N.Z. J. CRIMINOLOGY 199, 211 (2010) (“However, AIAN women were over two times more likely to face armed offenders and to be physically hit during the sexual assault compared to either White or African American women.”).

3. PATRICIA TJADEN & NANCY THOENNES, DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1–2 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

4. Laura Sullivan, *All Things Considered: Rape Cases on Indian Lands Go Uninvestigated*, NAT'L PUB. RADIO (July 25, 2007), <http://www.npr.org/templates/story/story.php?storyId=12203114>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Sullivan, *supra* note 4.

11. *Id.*

at the age of twenty from the injuries sustained during her attack.¹² Even though there were people willing to testify as to the identity of Ironroad's attackers, neither the federal authorities nor the Bureau of Indian Affairs police investigated her death.¹³ Her attackers escaped punishment for the brutal rape and murder of Leslie Ironroad.¹⁴

Leslie Ironroad's experience highlights the unfortunate plight of American Indian women. The federal authorities did not act, allowing a crime that occurred within the reservation border to go uninvestigated.¹⁵ Within this border, tribal courts and tribal authorities have been crippled, unable to act effectively because of the lack of power and funding.¹⁶ American Indians have been forced to rely upon inadequate federal services and attention for protection and redress.¹⁷ Jurisdictional differences have created safe havens for criminals who simply cross reservation borders, a cross-border issue faced on an international scale.¹⁸ This border issue has contributed significantly to the problem and has still not been effectively addressed. The federal government has failed in two respects: it has failed to provide American Indians with the tools they need to effectively combat this problem on their own, and it has failed to act on its own accord to effectively fight gender-based violence against American Indian women.¹⁹

The United States Congress recently recognized the problems facing American Indians, specifically citing the high rate of rape among American Indian women.²⁰ It stated further that the jurisdictional scheme on Indian reservations has led to the inability of tribal courts to effectively protect their constituents and punish criminals.²¹ Lack of funding and insufficient numbers

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 14 (2003).

17. See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 712–14 (2006) (evaluating “the federal constitutional norms that lie at the heart of American criminal justice and that are designed to ensure the legitimacy of federal criminal trials”).

18. See SUBCOMM. ON INVESTIGATIONS, H. COMM. ON HOMELAND SEC., 110TH CONG., A LINE IN THE SAND: CONFRONTING THE THREAT AT THE SOUTHWEST BORDER 25 (Comm. Print 2007) (describing how Mexican cartel members often live in the United States, commit crimes in Mexico, and return to the United States to escape Mexican criminal jurisdiction).

19. See Matthew Handler, Note, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 286–88, 296–99 (2009).

20. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 202(b)(4), 124 Stat. 2258, 2262 (codified as amended at 25 U.S.C. § 2801 cmt. (Supp. IV 2010)).

21. §§ 202(a)(4)(A)–(C), 124 Stat. at 2262.

of tribal and federal law enforcement officers were also cited as contributing to the problems facing American Indian women.²² In an effort to combat these issues as well as many others, the United States Congress passed the Tribal Law and Order Act of 2010 (hereinafter “TLO”) to overhaul of the tribal justice system.²³

This Note will consider the issue of rape among American Indian women. Specifically, it will analyze the ability of the TLO to effectively remedy the failure of the tribal justice system to protect American Indian women. To do so, specific rape statistics will be discussed. Additionally, the current jurisdictional scheme and other issues will be described. This Note will then single out the current problems and analyze whether the TLO will actually be able to streamline the tribal justice system and effectively ease the plight of American Indian women. Further, this Note will demonstrate that the TLO focuses on the wrong issue, takes only tentative steps, and ultimately fails to provide the full remedy it could have produced. In doing so, it does not solve the endemic problem of rape on tribal lands.

For the purposes of this Note, specific definitions will be used. “American Indian” is the accepted term for the indigenous peoples who populated North America before the arrival of Europeans.²⁴ Members of the Eskimo and Aleut tribes are known collectively as “Alaskan Natives” as well as “American Indians.”²⁵ Anyone who is a member of another race that has been adopted into a tribe does not become an Indian.²⁶ An Indian tribe constitutes a group of American Indians who share a common or similar race, recognize the same community leadership, and inhabit a particular territory, though it does not have to be well-defined.²⁷ “Indian country” is the statutory term used to describe Indian reservations and lands that fall under Indian leadership.²⁸

22. § 202(a)(3), 124 Stat. at 2262.

23. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, 124 Stat. 2258–2301 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., 42 U.S.C.).

24. Pence v. Kleppe, 529 F.2d 135, 139 n.5 (9th Cir. 1976).

25. *Id.*

26. United States v. Rogers, 45 U.S. 567, 572 (1846).

27. Montoya v. United States, 180 U.S. 261, 265–66 (1901).

28. 18 U.S.C. § 1151 (2006).

[T]he term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.

Unless otherwise stated, “rape” shall refer to forced vaginal, oral, or anal intercourse, as defined by federal law.²⁹

I. THE SAD TRUTH: RAPE AND STATISTICS

A. *A Comparison of Rape Statistics Between American Indian Women and the General Population*

American Indian women are two-and-a-half times more likely to be raped when compared to the general population of women in the United States.³⁰ Unfortunately, this statistic barely begins to describe the larger issue of gender-based violence in the Indian country. Studies have shown that American Indian women not only suffer from a greater incidence of rape, but they also undergo a far different experience than most of the general population.³¹

Between 17.6% and 25% of women in the United States will be raped in their lifetimes.³² The differences between these values are much discussed and are outside the scope of this paper.³³ According to several studies and sources,³⁴ 34% of American Indian women will be raped in their lifetime.³⁵ Even at the highest estimated rate of 25% in the general population, the consistently quoted rate among American Indian women is still considerably higher.

The rate of reported rapes between the general population and American Indian women varies greatly as well. Among the general population, some studies cite a reporting rate of 16%,³⁶ while others place the reporting rate closer to 35%.³⁷ Among American Indian women, 49% of rapes are

29. *Id.* § 2241(a); *id.* §§ 2246(2)(A)–(D).

30. AMNESTY INT’L, *supra* note 1, at 2.

31. Bachman et al., *supra* note 2, at 212–13.

32. TJADEN & THOENNES, *supra* note 3, at 7; *Sexual Assault Statistics*, ONE IN FOUR.ORG, <http://www.oneinfourusa.org/statistics.php> (last visited Mar. 13, 2012).

33. CHRISTINA HOFF SUMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 211–12, 215 (1994) (noting that this statistic lies in between two often debated rates: some studies report that one in eight American women will be raped within their lifetime while other studies report a rate of one in four).

34. Despite different affiliations and different studies, each of these sources has arrived at a comparable rate of 34%. See AMNESTY INT’L, *supra* note 1, at 2; Bachman et al., *supra* note 2, at 204; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000); 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

35. TJADEN & THOENNES, *supra* note 3, at 14.

36. DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>.

37. Bachman et al., *supra* note 2, at 211 tbl.1.

reported.³⁸ Though in the non-Indian population 21% of rape reports are made by the victim, only 17% of rapes are reported by American Indian victims.³⁹ Of rapes that are reported, approximately 33% result in an arrest and conviction among the non-Indian women, while only 13% of reported rapes of American Indian women result in an arrest and conviction.⁴⁰ This means that only 6% of all rapes committed against American Indian women result in an arrest and conviction as compared to 11-12% for non-Indian women.⁴¹

American Indian women are also far more likely to endure a violent rape than women in the general population.⁴² Ninety-one percent of American Indian women are struck at some point by the attacker during the rape, while approximately 71% of white women and 78% of African American women are struck during the rape.⁴³ Forty-seven percent of American Indian women, compared to 34% in the general population, require significant medical care.⁴⁴ Overall, this evidence demonstrates that American Indian women are at a greater risk of suffering more violent rapes.⁴⁵

The Bureau of Justice Statistics has determined, in general, American Indians suffer violent crime at a rate twice that of the general population.⁴⁶ Homicide rates among American Indians are twice those of the rest of the nation.⁴⁷ Consequently, because there is a higher overall rate of violence among American Indians, it is more likely for American Indian women to suffer considerable violence when raped.⁴⁸

Most rapes are committed by someone the victim knows.⁴⁹ In the general population, only 16.7% of women were raped by a stranger.⁵⁰ Among the American Indian population, however, the rate of rape by a stranger was 29%.⁵¹ On the other end of the spectrum, 38% of rapes of American Indian women are committed by an intimate partner.⁵² In contrast, only 20.2% of women in the general population are raped by an intimate partner.⁵³ In

38. *Id.*

39. *Id.*

40. *Id.* at 211–12.

41. *Id.* at 212.

42. *Id.*

43. Bachman et al., *supra* note 2, at 211 tbl.1.

44. *Id.* at 210–11 (noting medical care refers to something more than just routine post-rape examinations—it is usually treatment for bruising, broken bones, and other major injuries).

45. TJADEN & THOENNES, *supra* note 34, at 23.

46. *Id.*

47. *Id.*

48. *See id.*

49. TJADEN & THOENNES, *supra* note 3, at 21.

50. *Id.*

51. Bachman et al., *supra* note 2, at 211.

52. *Id.*

53. TJADEN & THOENNES, *supra* note 3, at 22.

between these two ends of the spectrum lies acquaintance rape. Among the general population, 58.8% of women are raped by someone other than an intimate partner (spouse, ex-spouse, cohabitating partner, or ex-partner) or a stranger,⁵⁴ while 38% of American Indian women are raped by an acquaintance.⁵⁵ Lastly, American Indian women are raped 57% of the time by a white man and 10% of the time by an African American man.⁵⁶ In contrast, white women are raped 76% of the time by a white man and black women are raped 88% of the time by an African American man.⁵⁷

As evidenced by these statistics, the rape of American Indian women looks very different than the rape of non-Indian women in the United States. The article *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaskan Native Women* effectively summarizes the entire situation:

AIAN victims are more likely to face armed offenders and more likely require medical care for injuries sustained as a result of the attack. Sexual assaults against AIAN women also are more likely to be interracial and the offender is more likely to be under the influence of drugs or alcohol compared to attacks against other victims. Although victimizations against AIAN women are more likely to come to the attention of police, they are much less likely to result in an arrest compared to attacks against either White or African American victims.⁵⁸

B. *Significance of the Rates*

There are several differences in the rates of rape that warrant further discussion. As previously mentioned, American Indian women are more likely to be struck and injured during their attack.⁵⁹ In the case of Leslie Ironroad, she was raped so violently that it led to her death one week later.⁶⁰ It is crucial to note that simply saying American Indian women are raped more often than non-Indian women is not enough. Not only are they raped more often, but they are more likely to be raped violently.⁶¹ This highlights that rape is an even more significant and more dangerous threat for American Indian women.

Consider also the differences in intimate partner and stranger rape rates between American Indian women and the non-Indian population. The majority of rapes committed against women in the general population are by

54. *Id.*

55. Bachman et al., *supra* note 2, at 211 tbl.1.

56. *Id.*

57. *Id.*

58. *Id.* at 212–13.

59. *See supra* notes 42–45 and accompanying text.

60. *See supra* notes 4–14 and accompanying text.

61. Bachman et al., *supra* note 2, at 211. American Indian women are struck during 91% of rapes, and 47% require significant medical care after the attack. *Id.* at 211 tbl.1.

acquaintances (people the victims know but are not intimate partners).⁶² On the other hand, the majority of rapes committed against American Indian women are actually committed either by strangers or intimate partners, not acquaintances as with non-Indian women.⁶³ This shows again that rape on tribal lands is a different situation than that faced by non-Indian women. It is also likely that many of the rapes are committed by non-Indians over whom the tribal police and courts have absolutely no jurisdiction.⁶⁴ Rape of American Indian women by a high number of non-Indians further demonstrates the protection for the rapist created by crossing the border. The differing jurisdictions create a safe haven for non-Indian rapists. They are able to cross into Indian country, commit the crime, and then run to relative safety back across the border.⁶⁵ The jurisdictional maze created by past laws has created and facilitated a situation that is more similar to an international rather than domestic border.⁶⁶ The safe haven afforded by crossing the border helps to cause the high rate of rape of American Indian women by strangers and non-Indians.

C. *Reasons for the Differences*

1. Historical

From their arrival, European explorers and settlers of the new American continent believed it was exactly that: new.⁶⁷ They believed this vast wilderness was theirs for the taking, with the opportunity to dominate and

62. *Id.*

63. *Id.*

64. American Indian women are raped 67% of the time by an attacker from another race. *Id.* If white attackers generally come from outside of the reservation, then it can be assumed that the majority of rapes by strangers are committed by a non-Indian attacker. *Id.* at 212. Also, even if the attacker is Indian, the tribal police and courts do not have original jurisdiction because of the Major Crimes Act. 18 U.S.C. § 1153 (2006).

65. Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1001 (2000).

66. Valentina Pop, *Europe Lacks Resources to Tackle Cross-Border Crime, Says Eurojust*, EUOBSERVER (Mar. 17, 2010, 5:36 PM), <http://euobserver.com/22/29703>. This article describes the difficulties of fighting cross-border crime in Europe due to the different jurisdictions of each nation, differing laws, scarce resources in European Union member states, and the ability of criminals to move freely from one country to another. *Id.* Indian reservations and the states they are located in face the same problems: different laws (federal law on the reservation versus that state's criminal law), lack of resources, and the ability of non-Indians to readily come and go from Indian reservations.

67. ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* 9 (First Mariner Books ed. 2002).

civilize it.⁶⁸ Furthermore, Europeans saw the American Indian as someone to control.⁶⁹ American Indians were slaughtered, forced to move off of their ancestral lands, and devastated by European diseases.⁷⁰

Today's scholars believe that prior to the arrival of Europeans, American Indian women held positions of importance in some tribes and that violence against women was rare, a position supported by modern accounts of tribal society by American Indian women.⁷¹ As Europeans began to force their world view upon these tribes, however, women began to lose their position in society.⁷² Settlers and soldiers frequently used rape as a weapon to control American Indian societies.⁷³ Additionally, they attacked the women because they were viewed as marginalized and less than human.⁷⁴ This view of American Indian women has proved remarkably persistent: in 1968, a federal appellate court upheld a statute that mandated a lower penalty against an American Indian man if the victim he raped was an Indian woman.⁷⁵ The University of North Dakota's mascot used to be the "Fighting Sioux," which inspired student groups to distribute t-shirts depicting a caricature of a Sioux Indian having sex with a bison.⁷⁶ This historical legacy of abuse and degradation has continued into the present day and created a dehumanized

68. *Id.* When Columbus left the New World to return to Spain the first time, he left a small group behind "to establish a Spanish city at La Navidad on [the island of] Hispaniola." *Id.* Once Columbus had disappeared behind the horizon, the men left behind proceeded to descend on the local villages, killing, raping, stealing, and enslaving at the point of the sword. *Id.* at 9–11. Though the settlement was eventually exterminated by local inhabitants, these men set the standard that thousands of conquistadors and colonists would follow in dealing with American Indians. *Id.* at 11–13.

69. For an account of the interactions and wars between white men and American Indians from the time of Columbus to Wounded Knee, see UTLEY & WASHBURN, *supra* note 67. The outbreaks of war between settlers and American Indians invariably resulted from the lust for Indian-held land and the desire to control the "savage" tribes. *Id.* at 8.

70. *Id.* at 12–13. Consider the case of the Cherokee. Originally, this powerful tribe was promised large tracts of land in the South. *Id.* at 139. But when white settlers began to want this land, the army was called upon to remove the Cherokee to Indian Territory in what became the Trail of Tears. *Id.* at 139–41. The Cherokee were forced off of their land, raped, and killed by the soldiers who were supposed to protect them, and devastated by hunger and sickness. *Id.*

71. GRETCHEN M. BATAILLE & KATHLEEN MULLEN SANDS, *AMERICAN INDIAN WOMEN: TELLING THEIR LIVES*, vii–viii (1984).

72. *Id.* at viii.

73. AMNESTY INT'L, *supra* note 1, at 16.

74. See John Demos, *The Tried and the True: Native American Women Confronting Colonization*, in *NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES* 3, 43 (Nancy F. Cott ed., 2000) (detailing the depravation of Cherokee women during the Trail of Tears and how white soldiers pulled women out of stockades "for sport").

75. *Gray v. United States*, 394 F.2d 96, 98 (9th Cir. 1968).

76. AMNESTY INT'L, *supra* note 1, at 17.

vision of the American Indian woman that has helped create the high rate of sexual assault these women face.⁷⁷

2. Jurisdiction and Law

The high rate of rape among American Indian women is also due in large part to the failures of the American legal system on Indian reservations. Tribal lands may be subject to several different jurisdictions. A combination of United States Supreme Court decisions, statutes, and Federal law enforcement and prosecution policies have created a “jurisdictional maze” that has contributed to a sense of lawlessness in Indian country.⁷⁸ For example, even when Congress attempted to improve the situation on reservations, it actually caused more problems. Under Public Law 280, the federal government transferred its jurisdictional rights on tribal lands to states that have large numbers of reservations within their borders,⁷⁹ but Congress failed to provide additional funds to the states for the increased law enforcement activity.⁸⁰ As a result, law enforcement decreased on reservations, which led to poor relations between state and tribal authorities.⁸¹ A more elaborate discussion of the jurisdictional, legal, and political issues that limit the full protection of American Indians is found in the later sections of this Note.⁸²

Conflicting jurisdictions, lack of funding, and a general lack of motivation all lead to a higher rate of crime, including rape, in Indian country.⁸³ Few rapes are fully investigated, let alone prosecuted.⁸⁴ This confusion of jurisdiction contributes greatly to the rape crisis among American Indian women.⁸⁵

II. SYSTEMIZED CONFUSION: THE PRE-TLO TRIBAL COURT SYSTEM

A. *Hamstrung by Statutes*

Indian tribes hold a unique position in the United States. Tribes are nominally sovereign authorities that have retained some powers, except where they have expressly forfeited these powers in a treaty or have been stripped of

77. *Id.*

78. *Id.* at 27–28. Because of these statutes and decisions, police officers are forced to determine the race of the victim, the race of the attacker, and where the attack occurred, all before they begin their investigation. *Id.*

79. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006)).

80. Thorington, *supra* note 65, at 1023.

81. *Id.*

82. *See infra* Parts II, III.

83. *See* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 16, at 14, 66–67.

84. *See id.* at 76.

85. *See id.* at 69.

the powers by Congress.⁸⁶ Early treaties between the United States and Indian tribes treated the tribes almost as distinct political entities who at least nominally shared the continent.⁸⁷ As the United States became more powerful and pushed farther west, Indian tribes lost this status.⁸⁸ Congress eventually passed the General Crimes Act, which gave criminal jurisdiction to the federal government in Indian matters with the exceptions where 1) an Indian committed the crime against another Indian while in Indian country; 2) an Indian had already been punished according to their tribal laws; or 3) the tribe's treaty with the United States reserved criminal jurisdiction to the tribe.⁸⁹

In the 1880s, a case came before the United States Supreme Court that would result in greatly restricted powers for tribal courts.⁹⁰ In the case of *Ex Parte Crow Dog*, a Lakota man named Crow Dog murdered another Lakota.⁹¹ In the 1880s, there was no official system of tribal justice on Lakota reservations, only traditional tribal methods.⁹² The Supreme Court held that the federal court for the Territory of Dakota could not extend its jurisdiction to tribal lands.⁹³ The United States government decided that this case highlighted the distinct lack of law in Indian country and passed the Major Crimes Act in 1885 to override the decision of the Supreme Court.⁹⁴

The Major Crimes Act extends federal jurisdiction to Indian lands over Indians and non-Indians for major crimes committed on Indian land.⁹⁵ This

86. U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

87. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (stating that in numerous treaties with the United States, tribes maintained their rights to make war and peace and punish crimes as they see fit).

88. See generally JON REYHNER & JEANNE EDER, AMERICAN INDIAN EDUCATION: A HISTORY 40–58 (2004). The authors discuss the initial treaties between the United States and American Indian tribes and note how originally, the United States treated tribes almost as equals and tried to honor treaty provisions that protected the tribal lands. *Id.* at 40–41. As the United States' population grew and more settlers moved west they violated these treaties. *Id.* at 48–51. At first, the United States tried to enforce the treaties against their own citizens but eventually began to disregard the treaties, responding to pressure by American citizens to open up tribal lands to the west for settlement. *Id.*

89. 18 U.S.C. § 1152 (2006).

90. B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 3 (2000), available at <http://www.icctc.org/Tribal%20Courts-final.pdf>.

91. 109 U.S. 556, 557 (1883).

92. JONES, *supra* note 90, at 3.

93. *Ex parte Crow Dog*, 109 U.S. at 572.

94. JONES, *supra* note 90, at 3.

95. 18 U.S.C. § 1153(a) (2006) (“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

resulted in a marked increase in criminal litigation in federal courts located adjacent to Indian reservations.⁹⁶ The courts were sufficiently overwhelmed to the point that they began to fail to prosecute more and more cases involving crimes in Indian country.⁹⁷ This led to a significant increase of crime in Indian country and a general appearance of lawlessness on reservations.⁹⁸ In an attempt to alleviate the strain on federal courts, the United States Congress passed Public Law 280 in 1953, granting criminal jurisdiction over Indian lands to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin.⁹⁹ This Act was met with disapproval from both tribal and state officials, with even President Eisenhower expressing doubts as to the wisdom of some of the provisions he was signing into law.¹⁰⁰ The law was a failure, as states were ill-equipped to handle the influx of criminal cases.¹⁰¹ The end result was a greater atmosphere of lawlessness on reservations coupled with an even greater degradation of tribal power.¹⁰²

In 1968, the United States Congress passed the Indian Civil Rights Act which required tribal consent to any new states assuming criminal jurisdiction in Indian country.¹⁰³ This benefit was countered by the restriction that tribal courts cannot deliver sentences greater than one year in jail or a fine greater than \$5,000.¹⁰⁴

B. Tribal Courts' Criminal Jurisdiction Today

The jurisdiction of tribal courts today is limited by the previously stated laws, treaties, and United States Supreme Court decisions. Tribal courts have full jurisdiction over Indians who are members of the tribe as well as Indians who are not members of the tribe so long as the crime was committed on the reservation that the tribal court is found on.¹⁰⁵ The Supreme Court has explicitly stated that tribal courts do not have the inherent authority to

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.”).

96. Handler, *supra* note 19, at 271.

97. *Id.*

98. *Id.*

99. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006)).

100. Handler, *supra* note 19, at 274.

101. See Thornton, *supra* note 65, at 1023 (noting that states received no additional funds to handle the increased case load and that in California, average response time of local law enforcement officials was at least three days).

102. Handler, *supra* note 19, at 274.

103. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-03 (Supp. IV 2010)).

104. 25 U.S.C. § 1302(a)(7)(B) (2006).

105. JONES, *supra* note 90, at 7.

prosecute non-Indian non-members for criminal conduct.¹⁰⁶ Additionally, tribal courts may not exercise jurisdiction over Major Crimes Act crimes unless the federal court has decided not to prosecute,¹⁰⁷ though the Indian Civil Rights Act hampers the federal court's power.¹⁰⁸ Lastly, tribal courts may only exercise jurisdiction over crimes committed on the reservation.¹⁰⁹ If an Indian commits a crime outside of the reservation, the tribal court has no jurisdiction.¹¹⁰

C. *Criminal Procedure of Tribal Courts*

Indian tribes were not created by the United States Constitution and therefore are not controlled by the Bill of Rights.¹¹¹ That said, the Indian Civil Rights Act grants many of the same basic rights created by the Bill of Rights.¹¹² Many of the rights an accused person has in the federal courts are also present in the tribal courts, though there are differences.¹¹³ Tribal courts utilize a six-person jury rather than the twelve-person jury required in federal court.¹¹⁴ Previously, tribal courts were not required to provide a defendant with a free attorney, though many tribal courts did institute their own public defender office.¹¹⁵ Qualifications of the attorneys in tribal courts vary. Some courts require an attorney to pass a bar exam, others require only that an attorney be familiar with the laws and constitution of the tribe, while others allow any person with a proven familiarity of tribal law to serve as counselors

106. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded by statute*, 25 U.S.C. § 1301 (Supp. IV 2010), *as recognized in*, *United States v. Lara*, 541 U.S. 193, 205–07 (2004) (denying tribal court jurisdiction to prosecute non-Indian non-members in Indian country with respect to misdemeanor criminal violations of tribal codes). *Oliphant* rejected the right of tribal courts to extend jurisdiction over American Indians who were not members of that tribe and non-Indians in general. *Id.* Non-Indians who were adopted into the tribe were within that tribe's jurisdiction. *Id.* 25 U.S.C. § 1301 returned jurisdiction of tribal courts to all Indians within the jurisdiction, including non-members, as recognized by the Supreme Court in *Lara*. 25 U.S.C. § 1301; *Lara*, 541 U.S. at 205–07. No Court decision or Congressional action has granted tribal courts jurisdiction over non-Indians who have not been adopted as members of an Indian tribe. *See infra* Parts II.F and III.

107. *See* 18 U.S.C. § 1153 (2006).

108. *See* JONES, *supra* note 90, at 7.

109. *Id.*

110. *Id.*

111. *Id.* at 9.

112. 25 U.S.C. §§ 1302–03 (Supp. IV 2010). Many of the same freedoms guaranteed by the Bill of Rights like freedom of speech, religion, and protection from unreasonable search and seizure are found in the Indian Civil Rights Act. *Id.* §§ 1302(a)(1)–(10).

113. JONES, *supra* note 90, at 9.

114. 25 U.S.C. § 1302(a)(10) (Supp. IV 2010).

115. JONES, *supra* note 90, at 9–10.

at law.¹¹⁶ The Indian Civil Rights Act also extends the right of habeas corpus to tribal courts.¹¹⁷

Beyond these issues, tribal courts vary greatly among themselves. Tribal law can be oral as well as written.¹¹⁸ More traditional tribes continue to use traditional law that has changed little since the colonization of the United States.¹¹⁹ While federal and state courts focus on an adversarial system of law, tribal law often focuses on mediation and traditional concepts of restorative justice.¹²⁰ This concept is known as tribal peacemaking and has been shown to be effective in reducing crime rates on some reservations.¹²¹ Though some tribes remain very traditional, the majority of tribes have sought to include elements of the Anglo-American legal system, creating a hybrid between traditional tribal law, common law, and federal statutes.¹²²

D. The Continuation of Historical Patriarchy: Interaction Between Tribal and Federal Courts

Tribal courts share jurisdiction with federal courts over some issues and are forced to cede their jurisdictional rights on other issues.¹²³ When the crime is under the Major Crimes Act, no matter the ethnicity of the accused, the defendant will be tried in federal courts, and prosecuted by a United States Attorney.¹²⁴ The federal prosecutor from the U.S. Attorney's office has wide discretion to decide whether to charge the defendant.¹²⁵ A prosecutor is seen as a member of the community, espousing the opinions of the community and gaining their authority from that community since most prosecutors are elected by the public.¹²⁶ Yet in Indian country, federal prosecutors are usually ignorant of the community values of the tribe.¹²⁷ For a variety of reasons including federal case loads, distance between reservations and the U.S.

116. *Id.* at 9.

117. 25 U.S.C. § 1303 (Supp. IV 2010).

118. Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1918 (2009).

119. *Id.*

120. *Id.* at 1919.

121. *Id.*

122. *Id.* at 1919–20. Note that this contributes to the jurisdictional maze discussed earlier. See *supra* notes 86–119 and accompanying text.

123. See 18 U.S.C. § 1153(a) (2006) (denying tribal jurisdiction over major crimes); 25 U.S.C. § 1302(a) (Supp. IV 2010) (establishing an Indian “Bill of Rights”); *id.* §§ 1302(b)–(c) (giving tribes explicit prosecutorial and incarceration abilities).

124. Washburn, *supra* note 17, at 717.

125. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1337 (1993).

126. *Id.* at 1338.

127. Washburn, *supra* note 17, at 729.

Attorney's office, and general prosecutorial disinterest, crimes on Indian reservations are pursued haphazardly.¹²⁸ When the U.S. Attorney declines to pursue a criminal prosecution under the Major Crimes Act, the federal court may grant jurisdiction to the respective tribal court.¹²⁹ Nevertheless, this course of action may not be desirable because of the limited punishing powers accorded to tribal courts by the Indian Civil Rights Act.¹³⁰

E. The Dominance of the State Court in Public Law 280 States

When Indian reservations are located in states that are not subject to the General Crimes Act, then the tribal courts often have little interaction with the state courts.¹³¹ In the Public Law 280 states,¹³² most tribes have turned over nearly all judicial and law enforcement functions to the state.¹³³ These departments are funded by state taxes, which Indians do not pay.¹³⁴ Crimes committed on Indian reservations by both Indians and non-Indians are prosecuted by the state courts.¹³⁵ In these states, tribal courts fill only minor roles, hearing only certain types of disputes specific to the tribe.¹³⁶

F. Hampered by the Court: Oliphant v. Suquamish Indian Tribe

The case of *Oliphant v. Suquamish Indian Tribe* in 1978 was a landmark decision that helped create much of the current jurisdictional maze.¹³⁷ This case dealt with the Suquamish Indian Tribe and the Port Madison Reservation in Washington.¹³⁸ The reservation contained lands governed mostly by the Suquamish Tribe, some state and federal roads, and a few properties held in fee simple by non-Indians.¹³⁹ The tribe had adopted a government with a Law and Order Code which specifically stated that the tribe's criminal jurisdiction extended over both Indians and non-Indians.¹⁴⁰

128. *Id.* at 729, 734.

129. *See* 18 U.S.C. § 1153 (2006).

130. 25 U.S.C. § 1302(b) (Supp. IV 2010).

131. *See* 18 U.S.C. § 1152 (stating that all crimes committed within Indian country shall be subject to the laws of the U.S. and will be tried in federal courts). *Cf. id.* § 1162(a) (granting criminal jurisdiction to *only* the enumerated states).

132. The states initially included were California, Minnesota, Nebraska, Oregon, and Wisconsin. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360). Alaska was added after being admitted for statehood. *See* 18 U.S.C. § 1162(a).

133. JONES, *supra* note 90, at 5.

134. Handler, *supra* note 19, at 281.

135. JONES, *supra* note 90, at 5.

136. *Id.*

137. 435 U.S. 191 (1978).

138. *Id.* at 192-93.

139. *Id.* at 193.

140. *Id.*

The case arose out of the arrest of Mark Oliphant and Daniel Belgarde, both non-Indians.¹⁴¹ Oliphant was arrested, charged, and prosecuted for assaulting a tribal officer, and Belgarde was arrested, charged, and prosecuted for recklessly endangering another person and injuring tribal property after he engaged in a high speed race and crashed into tribal authority patrol cars.¹⁴²

Both men applied for a writ of habeas corpus, contending that the Suquamish Indian Provisional Court had no jurisdiction over non-Indians.¹⁴³ Both the U.S. District Court and the Ninth Circuit disagreed, but the U.S. Supreme Court found that Indian tribal courts did not have criminal jurisdiction over non-Indians.¹⁴⁴

The Court discussed the wide history of Indian jurisdiction over non-Indians and came to the conclusion that historical actions, congressional acts, and court decisions all showed that tribal courts do not have jurisdiction over non-Indians.¹⁴⁵ The Court pointed out that tribal courts draw their law principally from treaties signed with the executive branch and legislation passed by Congress, and are generally silent on the issue of criminal jurisdiction over non-Indians.¹⁴⁶ Applying the historical context already discussed to these treaties, the Court found that the treaties did not intend to grant tribal courts criminal jurisdiction over non-Indians.¹⁴⁷

The Court also found that there were certain issues of sovereignty. Indian tribes exercise separate power but do so within the constraints of the territorial sovereignty of the United States, and thus their rights to complete sovereignty are necessarily diminished.¹⁴⁸ The power to try and criminally punish greatly restricts personal liberty, and therefore must be conducted in the manner required by Congress.¹⁴⁹ The Court noted that in “submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”¹⁵⁰ Therefore, since the Court found that tribal courts did not have the inherent right of criminal jurisdiction over non-Indians *and*

141. *Id.* at 194.

142. *Id.*

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

144. *Id.* at 194–95.

145. *See id.* at 196–206.

146. *Id.* at 206.

147. *Id.* at 207.

148. *Id.* at 208–09 (“Indian reservations are a ‘part of the territory of the United States.’ Indian tribes ‘hold and occupy [the reservations] with the assent of the United States, and under their authority.’” (quoting *United States v. Rogers*, 45 U.S. 567, 571–72 (1846))).

149. *Oliphant*, at 210.

150. *Id.*

Congress had not expressly granted this right, tribal courts are not able to exercise criminal jurisdiction over non-Indians.¹⁵¹

G. The Practical Effect of Oliphant

This decision had a dramatic negative impact in Indian country. Tribal law enforcement and victim advocates report that after this decision there was a substantial increase in crime committed by non-Indians on tribal lands.¹⁵² *Oliphant* has allowed non-Indians to commit rape on an Indian reservation knowing they have a greater chance of evading punishment than anywhere else.¹⁵³ As non-Indians learned of the new policies, it became widely known in communities surrounding Indian reservations that there was little to fear from tribal officers who had no jurisdiction over non-Indians.¹⁵⁴ American Indian women must then rely on an overworked, inefficient, and disinterested federal legal system for justice with the practical result that far too often their attackers go free, even after the women have reported the crime.¹⁵⁵ The decision in *Oliphant* simply created yet another barrier to protecting and providing justice for American Indian women.

III. FAILURE OF THE LEGAL SYSTEM IN PROTECTING AND PROVIDING JUSTICE
TO AMERICAN INDIAN WOMEN

A. The Jurisdictional Maze

The legal system fails American Indian women who have been raped.¹⁵⁶ After a rape has been committed, there are three initial factors that must be satisfied to determine jurisdiction: whether the victim was a member of federally recognized Indian tribe, whether the attacker was a member of a federally recognized Indian tribe, and whether the rape took place on tribal

151. *Id.* at 212. The Supreme Court observed, “[b]y acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation.” *Id.* at 207.

152. AMNESTY INT’L, *supra* note 1, at 30.

153. See Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, FED. LAW., Mar./Apr. 2007, at 40, 44–45 (discussing the result of *Oliphant* when non-Indians realized they were able to commit crime on Indian reservations with a much lower chance of retribution).

154. *Id.* at 44 (quoting Senator Ben Nighthorse, “the word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land.” (footnote omitted)).

155. ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 142–43 (2005).

156. See AMNESTY INT’L, *supra* note 1, at 1–2.

land.¹⁵⁷ Differences between federal, state, and tribal laws mean that the same answers to these questions may have different results depending on where the rape took place.¹⁵⁸ The jurisdictional question can become so complex that each authority assumes someone else should handle the crime with the result that no one does.¹⁵⁹

B. Law Enforcement

1. Survey of Tribal Law Enforcement

Under the Indian Self-Determination and Education Assistance Act, the United States Congress provided Indian tribes with the ability to contract with the Bureau of Indian Affairs (hereinafter “BIA”) to create tribal law enforcement.¹⁶⁰ This establishes tribal police departments that are funded by the federal government and fit into the organizational framework of the BIA’s Division of Law Enforcement Services.¹⁶¹ This is the most common type of tribal law enforcement.¹⁶² Law enforcement is still controlled by the tribal government on that reservation, but their control and operation must fit within the BIA’s guidelines.¹⁶³

Some tribes have entered into “self-governance compacts” with the BIA, which allow them to take federal grants to create their own tribal law enforcement offices.¹⁶⁴ These tribes retain almost complete control over their law enforcement as they do not have to adhere to the guidelines of BIA law enforcement, though they are still required to meet certain conditions of operation in order to receive the federal grants.¹⁶⁵ Some Indian tribes even fund their law enforcement completely from tribal funds, which offers the greatest control and autonomy.¹⁶⁶

Unless the tribe has created its own law enforcement as described above, the BIA handles all law enforcement in Indian country as required by the Indian Law Enforcement Reform Act of 1994.¹⁶⁷ The BIA is required to

157. *Id.* at 27.

158. *Id.*

159. *Id.* at 27–28.

160. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 *et. seq.* (Supp. IV 2010)); *see also* STEWART WAKELING ET AL., U.S. DEP’T OF JUSTICE, POLICING ON AMERICAN INDIAN RESERVATIONS 7 (2001), *available at* <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

161. WAKELING ET AL., *supra* note 160, at 7.

162. *Id.*

163. *Id.*

164. Handler, *supra* note 19, at 279–80.

165. *See id.*

166. *See* AMNESTY INT’L, *supra* note 1, at 29.

167. 25 U.S.C. §§ 2801–02 (Supp. IV 2010). “The Secretary, acting through the [BIA], shall be responsible for providing, or for assisting in the provision of, law enforcement services in

police all reservations that do not have established tribal law enforcement and apply federal, not tribal, law on the reservations they police.¹⁶⁸

2. Failure of Tribal Law Enforcement to Protect American Indian Women

The high rate of rape among American Indian women coupled with the low rate of arrest and prosecution (despite a higher than average reporting rate)¹⁶⁹ shows that the law is failing these women. Among tribal law enforcement, the problem is often attributed to lack of funding, poor training, and occasionally apathy.¹⁷⁰

Lack of proper funding is most often cited as a crucial problem.¹⁷¹ Generally, tribes operate with 55% to 75% of the funding that law enforcement agencies in comparable rural communities have.¹⁷² Most tribal law enforcement agencies have comparable police-to-citizen ratios to non-Indian rural communities.¹⁷³ Yet, evidence suggests that a comparison between rural non-Indian jurisdictions and Indian jurisdictions is erroneous.¹⁷⁴

The funding issues faced by tribal law enforcement are compounded by the sheer size of their jurisdiction.¹⁷⁵ In debates over the TLO, Congress also noted that less than 3,000 tribal and federal officers patrol fifty-six million acres of tribal land, a rate that is less than half of the law enforcement presence in comparable rural communities nationwide.¹⁷⁶ In addition, facilities and equipment among tribal law enforcement are outdated, insufficient, and generally unfit for the purposes required.¹⁷⁷ As funding is often conditioned on meeting requirements set by the tribes, the BIA, and the federal government, there is also considerable political influence that prevents the police from

Indian country as provided in this chapter.” *Id.* § 2802(a). The BIA is ultimately responsible for providing law enforcement in Indian country. *Id.* § 2802(b).

168. *Id.* §§ 2801(8), 2802(b). Though required to apply federal law, the BIA may enforce tribal law with the permission of that tribe. *Id.* § 2802(c)(1).

169. *See supra* text accompanying notes 36–41.

170. *See* WAKELING ET AL., *supra* note 160, at vii; U.S. COMM’N ON CIVIL RIGHTS, *supra* note 16, at 14, 75–76, 79.

171. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 16, at 76, 79.

172. WAKELING ET AL., *supra* note 160, at vii.

173. *Id.* at 27.

174. *Id.* at vii. Indian reservations have crime rates comparable with major crime ridden cities where the police-to-citizen ratio approaches seven officers for every thousand citizens. *Id.* Most Indian reservations have no more than two officers for every thousand citizens, despite having a similar crime rate. *Id.*

175. In 2006, the Standing Rock Police Department consisted of nine officers who had to patrol and serve 2.3 million acres. AMNESTY INT’L, *supra* note 1, at 43. Standing Rock Reservations straddle the boundary of South and North Dakota. *Id.* at 32.

176. 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

177. WAKELING ET AL., *supra* note 160, at 26.

performing their duties effectively, which reduces their credibility in the community.¹⁷⁸ Furthermore, many tribal officers lack specific training in responding to and investigating crimes of sexual violence.¹⁷⁹ Though there are many diligent, hardworking, and honorable tribal officers who do the best they can every day, the problem stems from being forced to work without the benefit of sufficient training or funding.¹⁸⁰ This hurts American Indian women who do not receive the protection they deserve, or the proper investigatory services needed to secure redress.

3. Federal Law Enforcement in Indian country

The mission of the Federal Bureau of Investigation (hereinafter “FBI”) is to protect the United States from terrorist threats, foreign intelligence threats, combat major crimes, and provide support to local law enforcement.¹⁸¹ In a listing of the FBI’s ten priorities, supporting local law enforcement is number nine.¹⁸² It is in this role that the FBI comes to Indian Reservations, as it has investigative jurisdiction over all crimes listed in the Major Crimes Act.¹⁸³ Professor Kevin Washburn has described the actions of FBI agents on tribal lands based upon his observations as a federal prosecutor in Indian country, as well as from interviews with FBI agents, other federal prosecutors, and federal public defenders who have worked in Indian country.¹⁸⁴ Most FBI investigations are proactive, seeking to prevent a major crime, while on Indian reservations almost all of the crimes investigated by the FBI are reactive.¹⁸⁵ The FBI is capable of bringing the most sophisticated investigative techniques to bear on a criminal investigation, but on Indian lands, most of these techniques are worthless.¹⁸⁶ Apart from DNA testing, investigation into cases

178. *Id.* at 38.

179. AMNESTY INT’L, *supra* note 1, at 51.

180. *See* Sullivan, *supra* note 4. The article describes how officers tried to investigate every case but were simply overwhelmed by the number of calls for rape and sexual assault in a jurisdiction the size of Connecticut covered only by five officers. *Id.* The officers also understand that they had to have a perfect case before they could go to the federal prosecutor: “We all knew [federal prosecutors] only take the [rape cases] with a confession . . . [w]e were forced to triage our cases.” *Id.* The same officer noted that he “felt like [he] was standing in the middle of the river trying to hold back the flood.” *Id.*

181. *Quick Facts*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/quickfacts.htm> (last visited Mar. 13, 2012).

182. *Id.*

183. *See* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 675–76 (1997) (detailing the U.S. Attorney’s policy that the FBI has investigative jurisdiction over violations of the Major Crimes Act).

184. Washburn, *supra* note 17, at 718 n.30.

185. *Id.* at 718.

186. *See id.* Consider the FBI’s Carnivore computer surveillance system that is capable of intercepting all forms of Internet communication connected with a single computer, or IP

of rape requires plain, unsophisticated police work: looking for evidence and conducting interviews.¹⁸⁷

Additionally, FBI agents are assigned to Indian reservations as individuals, a system counter to the usual team-based structure of the FBI.¹⁸⁸ When FBI agents collaborate with other officers, it is most likely with tribal officers who do not have the same type or level of training as a FBI agent.¹⁸⁹ FBI agents often cover hundreds of miles of rural roads, and are not actually posted on the reservation but rather in small cities outside of the reservation.¹⁹⁰ These postings are not prestigious and have a high turnover rate as agents attempt to transfer to higher profile postings.¹⁹¹

FBI agents also face a major cultural barrier.¹⁹² Indian communities are often closed and generally distrusting to outsiders.¹⁹³ Because of this, FBI officers face great difficulties in conducting an investigation and establishing rapport that tribal officers do not face.¹⁹⁴ If FBI agents cannot establish a close relationship with tribal officers, then a great deal of information accessible only to members of the community will be closed to them as outsiders.¹⁹⁵ It has been noted that federal agents do not receive specific training to deal with the cultural norms and practices that they will encounter on tribal lands.¹⁹⁶ The

Address. Laurie Thomas Lee, *The USA PATRIOT ACT and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH. L.J. 371, 392–93 (2003). The FBI also has a program called Echelon that is capable of searching the entire Internet to evaluate possible threats to national security. *Id.* at 376. It is highly unlikely that these incredible technologies would be effective in finding a rapist in Indian country.

187. See Washburn, *supra* note 17, at 718.

188. *Id.* at 718–19; see also *On the Road Again: A Day in the Life in Indian Country*, FED. BUREAU OF INVESTIGATION (Sept. 17, 2007), http://www.fbi.gov/news/stories/2007/september/indian_091707 (describing the “solitary life of special agents in Indian Country” and Special Agent Doug Klein’s testimony of four hundred miles of travel each day).

189. Washburn, *supra* note 17, at 718. FBI agents have to work with local officers despite differences in training, power, and methods because local officers are more familiar with the community and many police activities require multiple officers for safety and security. *Id.* at 718–19. Because FBI agents are often assigned individually, they must rely on the support of local officers. *Id.* at 719.

190. *Id.*; see also *On the Road Again*, *supra* note 188. Agent Doug Klein wakes up early in the morning to leave from Billings, Montana and then drives hundreds of miles to check in with all of the ongoing cases and with the various local tribal offices on the reservations. *Id.*

191. Washburn, *supra* note 17, at 719.

192. *On the Road Again*, *supra* note 188 (“You have to know who’s related to whom, whether someone’s status in a tribe will complicate your case, what the history of various tribes is and the differences between them. We lean on our tribal partners as much as we can, but the more we truly grasp the realities here, the better.”).

193. Washburn, *supra* note 17, at 721.

194. *Id.*

195. *Id.*

196. AMNESTY INT’L, *supra* note 1, at 51.

role of the agent on tribal lands is sequestered from the flashier roles in anti-terrorism and white collar criminal investigations, and is thus engaged in haphazardly.¹⁹⁷ Therefore, in a system that already minimizes major violent crimes on Indian lands, American Indian women are minimized to an even greater extent when they are raped. The crime that has hurt them is not worth the effort for the overstretched and disinterested FBI agent.

C. *The Prosecutorial Failure for American Indian Women*

1. Federal Prosecution

Rape is listed as one of the “major crimes” under the Major Crimes Act.¹⁹⁸ Therefore, the majority of rapes on Indian lands should be prosecuted by the nearest U.S. Attorney’s office. It is assumed that a prosecutor represents the norms of the community where they live and work.¹⁹⁹ In the United States, the prosecutor has significant discretion and power to bring defendants to trial.²⁰⁰ For many reasons, though, this power is severely hampered in matters involving American Indians. Due to the jurisdictional maze, long delays may result, allowing the attackers of American Indian women to escape punishment.²⁰¹

Prosecutors are seen as representatives of the community, even within the federal system because they live in the community, speak the language of the community, and should be tuned to the issues that are of greatest concern to the community.²⁰² This is not true among the American Indian population. The assistant U.S. Attorney assigned to Indian prosecutions does not live in the community, does not speak the language, and is not familiar with their values and culture.²⁰³ This personal distance allows the prosecutors to make prosecutorial decisions with little consideration for the victims and the pain felt

197. Washburn, *supra* note 17, at 718–19. Though murder and rape are major crimes to the small communities where they occur, they are local crimes that would generally be investigated by local officers. *Id.* To the FBI, these “major” local crimes are much less important than organized crime and anti-terrorism, and, therefore, “Indian country crimes rarely rank high among the FBI’s priorities.” *Id.* at 718.

198. 18 U.S.C. § 1153(a) (2006); *see also id.* § 2241.

199. *See United States v. Cox*, 342 F.2d 167, 192 (5th Cir. 1965) (Wisdom, J., concurring).

200. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007). A prosecutor’s decision whether or not to charge a crime is not reviewed by any power outside the prosecutor’s office, and prosecutors are not required to explain their reasoning for refusing to charge. *Id.*

201. AMNESTY INT’L, *supra* note 1, at 61–62.

202. Pizzi, *supra* note 125, at 1338.

203. Washburn, *supra* note 17, at 730 (finding that American Indian communities are generally suspicious of outsiders and would likely be wary of confiding in a federal prosecutor). In part because of his lack of knowledge of Indian community values, a prosecutor will have trouble building a case, which could discourage him from even prosecuting at all. *Id.* at 729–30.

within the community.²⁰⁴ If they do not live with or understand the pain American Indian women must endure, they are able to consider cases of rape from Indian country with a detachment that prosecutors who work and live in the same community cannot.

American Indians also hold little power over federal prosecutors, or even state prosecutors.²⁰⁵ American Indians as a group have very little political clout and therefore lack the ability to vote in such a way as to replace federal prosecutors, especially since federal prosecutors are appointed through the President.²⁰⁶ Even in states where American Indians are more prevalent, they still generally lack the electoral power to remove prosecutors who are blind to the issues faced on Indian reservations.²⁰⁷ Additionally, in what is characterized as “the cavalry effect,” federal prosecutors may show up on Indian reservations acting as if they are saviors battling the lawlessness and crime in Indian country.²⁰⁸ This stands in stark contrast to the fact that only a little over one hundred years ago the same federal government was engaged in brutal wars with the tribe’s ancestors.²⁰⁹

Discrimination also plays a part in the failure of justice for American Indian women. It has been suggested that there has been deliberate failure of federal prosecutors to pursue cases of rape involving American Indian women, partly a result of racial discrimination.²¹⁰ Also, federal prosecutors often will pursue only those cases that will almost certainly result in a conviction.²¹¹ Prosecutorial lack of understanding of the Indian community results in skewed opinions of the women and gross generalizations of what it means to be an American Indian.²¹² Based upon these generalizations, prosecutors may well

204. See Handler, *supra* note 19, at 286–87 (suggesting that prosecutorial detachment may impair the ability to create a full and effective prosecution).

205. Washburn, *supra* note 17, at 731.

206. *Id.*

207. See STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 5 tbl.2 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf> (detailing the percentage of American Indian population by state).

208. See Washburn, *supra* note 17, at 735–38.

209. See UTLEY & WASHBURN, *supra* note 67, at 280–301 (describing the final battles between the United States and Indian tribes, especially the massacre at Wounded Knee in 1894).

210. AMNESTY INT’L, *supra* note 1, at 66 (stating that 60.3% of filed sexual violence cases between October 1, 2002 and September 30, 2003 were not prosecuted).

211. See Pizzi, *supra* note 125, at 1349 (discussing how the focus on the adversarial process in the American legal system encourages prosecutors to take only the cases they are sure they can win). If a federal prosecutor does not think he can build an effective case because of his distance from the Indian community, then the adversarial process encourages him to drop the case and keep his winning percentage high. *Id.* at 1349; see also Sullivan, *supra* note 4 (describing how tribal officers will only investigate the cases that have a confession because these are the only cases the federal prosecutor will take).

212. AMNESTY INT’L, *supra* note 1, at 70.

see the case as unwinnable because a jury will not protect another “drunk Indian” and will choose not to take the case.²¹³

Most daunting is the lack of American Indians serving on juries. American Indians represent only a small portion of the population of the United States²¹⁴ but even then, it would be expected that in states with high concentrations of reservations more Indians would be included in the jury process.²¹⁵ Unfortunately, due to issues of poverty, near geographical isolation, and lack of Indian participation in the electoral process, Indians are less represented on juries than they should be.²¹⁶ It is clear that American Indians face discrimination based upon old world stereotypes and prejudices. In a case in Oklahoma, an American Indian woman was raped and beaten by two white men who gave her a ride home.²¹⁷ Despite considerable evidence, the first jury was unable to reach a verdict, with one juror even stating, “[s]he was just another drunk Indian.”²¹⁸

Due to their lack of knowledge of Indian culture as well as other issues like the “cavalry effect,” federal prosecutors often are not trusted in Indian communities.²¹⁹ This is a detriment to compiling an effective prosecution and may even discourage Indian victims from reporting crimes.²²⁰ It appears to the women on the reservation that they are being ignored.²²¹ Furthermore, American Indians continue to suffer racial discrimination and are underrepresented on juries.²²² All of these issues combine to demonstrate a failure by the federal courts to provide American Indian women with the redress and justice they deserve.

2. State Prosecution

It is also important to note the condition of prosecution in Public Law 280 states. These states are required to exercise criminal jurisdiction over Indian reservations.²²³ Prosecutors in these states are funded by state taxes, which

213. *Id.* at 71.

214. *See* OGUNWOLE, *supra* note 207, at 5.

215. *See* Washburn, *supra* note 17, at 747.

216. *Id.* at 747–48.

217. AMNESTY INT’L, *supra* note 1, at 71.

218. *Id.* The second jury sentenced one attacker sixty years in prison and the second attacker for ten years. *Id.*

219. Washburn, *supra* note 17, at 738.

220. Handler, *supra* note 19, at 287.

221. *See supra* notes 4–14 and accompanying text. Leslie Ironroad’s friend, Rhea Archambault, could not believe that Ironroad’s report of her rape yielded nothing. Sullivan, *supra* note 4. Archambault stated, “She named all of the people that were there, the ones that were hitting her, the ones that were fighting her, she named everybody—what more else?” *Id.*

222. Handler, *supra* note 19, at 287; AMNESTY INT’L, *supra* note 1, at 1.

223. 18 U.S.C. § 1162(a) (2006).

American Indians do not pay.²²⁴ State governments are even less equipped to properly prosecute crimes on reservations than the federal government, leading to dissatisfaction with the state authorities on tribal lands.²²⁵ The Supreme Court noted that tribes “owe no allegiance to the States, and receive from them no protection.”²²⁶ This gives rise to poor relations between state authorities and the Indians, often making state representatives American Indians’ “deadliest enemies.”²²⁷ All of these factors create a lack of protection and redress for American Indian women who have been or are in danger of being raped.²²⁸ In Alaska (a Public Law 280 state), data shows that in 90% of cases in which Alaskan Native women underwent sexual assault exams, there was no prosecution of the case.²²⁹ This shows that prosecution in Public Law 280 states also fails American Indian women.

3. Tribal Prosecution

Tribal courts do not face the same problems as federal courts face—lack of cultural knowledge, distance from the crime, and detachment.²³⁰ That said, tribal prosecution does have issues that result in poorer aid to victims of sexual violence. Most importantly, tribal courts are limited in their power by federal law because they do not have jurisdiction over cases of rape due to the Major Crimes Act.²³¹ Tribal courts can only receive jurisdiction if the federal prosecutor chooses not to prosecute the case.²³² Also, before the passage of the TLO even when prosecuting, tribal courts could not deliver sentences of greater than one year in prison or a fine greater than \$5,000.²³³ This meant that if a tribal court did successfully prosecute a rapist, they faced a maximum of a one year punishment for a serious felony offense.²³⁴ Additionally, tribal courts only have jurisdiction over Indians,²³⁵ meaning that they must decline to

224. Handler, *supra* note 19, at 281.

225. *See id.* at 281 & n.127.

226. United States v. Kagama, 118 U.S. 375, 384 (1886).

227. *Id.* at 384.

228. *See* AMNESTY INT’L, *supra* note 1, at 69. It is also likely that many of the cultural, geographical, and other issues that afflict federal courts are present in state courts as well. Public Law states are very large (i.e., California, Alaska, Minnesota), and reservations are in rural locations, far from state courts. *See supra* notes 99–102 and accompanying text.

229. AMNESTY INT’L, *supra* note 1, at 69.

230. *See* Washburn, *supra* note 17, at 738.

231. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 148–49 (3d. ed. 2002); *see also supra* notes 95–97 and accompanying text.

232. PEVAR, *supra* note 231, at 148–49.

233. 25 U.S.C. § 1302(a)(7) (2006). The TLO has increased punishing power as discussed in Part IV *infra*.

234. *See id.*; *see also* 18 U.S.C. § 2241(a)(2) (2006).

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

prosecute a significant percentage of the rapes committed against Indian women.²³⁶

The hope is that federal prosecutors will take up the case and be able to secure a much more severe sentence.²³⁷ The federal statute against rape allows for a maximum prison sentence of life imprisonment.²³⁸ Furthermore, when federal prosecutors decline to prosecute, the result may be that by the time the case comes to the tribal court, the crime will have occurred more than a year before.²³⁹ By this time, the victim may want to simply forget, witnesses may be harder to find, and the case may be nearly impossible to pursue with the result that the attacker goes free.²⁴⁰ And of course, if the attacker was non-Indian, the tribal court has no recourse.

Tribal courts are governed by the community that the crime has occurred in. Based on the American court system, local courts are best suited to prosecute local crimes.²⁴¹ Tribal courts are denied this power.²⁴² Moreover, when they have had the opportunity to prosecute, they have been severely hampered in their ability to do so.²⁴³ Because of these limitations, tribal courts are unable to provide full protection and redress for the American Indian women who are consistently subjected to rape within their own communities.

IV. A TENTATIVE STEP: THE TRIBAL LAW AND ORDER ACT OF 2010

The TLO passed with nearly unanimous support in both the Senate and the House of Representatives, which demonstrates the wide-spread recognition of the importance of this issue.²⁴⁴ In its findings, Congress cited the jurisdictional maze that afflicts Indian reservations and specifically noted the high rate of rape among American Indian and Alaskan Native women.²⁴⁵ They stated further that the purpose of the TLO was:

- (1) to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country;
- (2) to increase cooperation and communication among Federal, State, tribal, and local law enforcement;
- (3) to empower tribal governments with the authority,

236. Bachman et al., *supra* note 2, at 211.

237. See 18 U.S.C. § 2241(a)(2) (providing for a sentence of up to life in prison for the crime of rape).

238. *Id.*

239. See Handler, *supra* note 19, at 290.

240. See *id.* at 290–93; see also AMNESTY INT'L, *supra* note 1, at 63.

241. See Pizzi, *supra* note 125, at 1337–39 (stating that prosecutors are elected by the community and must create a prosecutorial record that agrees with the community to secure re-election).

242. See PEVAR, *supra* note 231, at 148–49.

243. See 25 U.S.C. § 1302(a)(7) (2006).

244. 156 CONG. REC. H5862 (daily ed. July 21, 2010) (statement of Rep. Rahall).

245. 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women; (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and (6) 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.²⁴⁶

A. *A Modest Increase in Prosecutorial Power*

Specifically, tribal courts would gain power and greater ability to prosecute under the TLO. The Act entails changes made to the Indian Civil Rights Act of 1968, increasing tribal courts' sentencing power from one year and a \$5,000 fine up to three years and a \$15,000 fine.²⁴⁷ Still, there are limits to this power because the defendant must have either previously been convicted of a comparable crime in any jurisdiction of the United States or the crime being prosecuted must be punishable by more than one year if prosecuted by the United States or any of the states.²⁴⁸ Additionally, in order to avail themselves of these powers, the tribal courts must provide defense attorneys based upon federal guidelines at their own expense.²⁴⁹ The most important and most limiting factor is that the TLO specifically states that no provision in the act will confer to tribal courts criminal jurisdiction over non-Indians.²⁵⁰

The TLO also attempts to increase and streamline interaction between federal prosecutors and tribal courts. If a U.S. Attorney declines to prosecute a crime committed on an Indian reservation, they must provide the relevant tribal court and prosecutor with a report detailing the status of the investigation, the status of the case, and the reason for the declination to prosecute.²⁵¹

U.S. Attorneys for each district that include Indian reservations must also establish a tribal liaison.²⁵² The liaison's duties will consist primarily of coordinating criminal investigation and prosecution on the reservations.²⁵³ These districts must also appoint a special prosecutor to specifically prosecute crimes committed on tribal lands.²⁵⁴ The Attorney General will coordinate with each tribal court in appointing the special prosecutors.²⁵⁵

246. *Id.*

247. *Id.* § 1302(a)(7)(C).

248. *Id.* §§ 1302(b)(1)–(2).

249. *Id.* §§ 1302(c)(1)–(2).

250. *Id.* § 2801 cmt.

251. 25 U.S.C. § 2809(a) (Supp. IV 2010).

252. *Id.* § 2810(a).

253. *See id.* § 2810(b) (listing the specific duties of the Tribal Liaison).

254. *Id.* § 2810(d)(1)(A).

255. *See id.* §§ 2810(d)(1)(B)–(D).

B. *Combating the Jurisdictional Maze*

The TLO makes attempts to clear the jurisdictional maze. The first method involves the creation of a nine-member Indian Law and Order Commission.²⁵⁶ This federal commission must complete a comprehensive study of law enforcement and criminal justice on tribal lands, and report its findings to Congress within two years of the signing of the bill.²⁵⁷ It must analyze how current jurisdictional rules affect criminal investigations and prosecutions on tribal lands.²⁵⁸ It is specifically tasked with determining how to simplify jurisdiction in Indian country.²⁵⁹

The second attempt involves commissioning more tribal, state, and local law enforcement officers as federal officers.²⁶⁰ This means that these officers will be able to fight crime so long as it is within federal jurisdiction.²⁶¹ This action is meant to increase cooperation among law enforcement offices, improve criminal investigations, and strengthen criminal prosecution.²⁶²

C. *Additional Law Enforcement Improvements*

In addition to the improvements stipulated for law enforcement mentioned previously, the TLO seeks to provide better and greater training opportunities for tribal law enforcement officers.²⁶³ Tribal officers are now able to train at any state or federal law enforcement training facility and must meet the standards accepted by the Federal Law Enforcement Training Accreditation Commission.²⁶⁴

The TLO states that a Special Law Enforcement Commission from the Office of Justice Services of the BIA will develop a plan and enter into agreements with tribal governments to enhance training and certification of tribal officers in federal law.²⁶⁵ This training will be conducted with an eye to

256. *Id.* §§ 2812(a)–(b).

257. Troy A. Eid, *The Tribal Law and Order Act: An “Aggressive Fight” Worth Winning*, FED. LAW., Mar./Apr. 2010, at 34, 36.

258. *Id.*

259. 25 U.S.C. § 2812(e)(1) (Supp. IV 2010).

260. Eid, *supra* note, 257.

261. *Id.*

262. *Id.*

263. *See* 25 U.S.C. § 2802(c)(13) (Supp. IV 2010).

264. *Id.* § 2802(e)(1)(B). Previously, tribal officers trained mostly at the Indian Police Academy in Arestia, New Mexico. *Indian Police Academy*, U.S. DEP’T. OF THE INTERIOR, <http://www.bia.gov/WhoWeAre/BIA/OJS/IPA/index.htm> (last updated Mar. 16, 2012) (describing how tribal officers had little access to training until the creation of the Indian Police Academy, which eventually came to be located in Arestia, New Mexico in 1993).

265. 25 U.S.C. § 2804(a)(3)(A) (Supp. IV 2010).

increasing the number of special law enforcement commissions provided to tribal law enforcement officials.²⁶⁶

The TLO also calls for the creation of the Indian Law Enforcement Foundation.²⁶⁷ This foundation will specifically coordinate efforts on tribal lands across the United States and will “assist . . . in funding and conducting activities and providing education to advance and support the provision of public safety” in Indian country.²⁶⁸ The hope is that this foundation will help to improve the abilities of tribal law enforcement and reduce the Federal responsibility for providing safety and justice on tribal lands.²⁶⁹ Most importantly, the TLO encourages cooperative agreements between local law enforcement and tribal police, as well as cross-deputization.²⁷⁰ This improves the effectiveness of tribal and local law enforcement and is directed at destroying the idea of safety if a criminal slips back across the reservation boundary.

D. *The TLO and Public Law 280*

The TLO provides that if they should choose, Indian tribes located in Public Law 280 states may request that the United States assume concurrent jurisdiction to prosecute crimes under the Major Crimes Act.²⁷¹ In cases where the United States exercises jurisdiction, Federal law will be applied.²⁷²

E. *Provisions to Specifically Assist American Indian Women*

As Congress stated in its findings, a major goal of the TLO is to combat the high rate of sexual violence among American Indian women.²⁷³ There are several specific ways that the TLO means to do this. One of the duties of the tribal liaison in the U.S. Attorney’s Offices is to develop multidisciplinary teams to focus on combating sexual violence offenses against Indian women.²⁷⁴ Additionally, tribal and federal law enforcement officers, as well as tribal health workers, will receive specialized training for investigating incidents of sexual assault and violence.²⁷⁵ The Director of Indian Health Services (hereinafter “IHS”), in conjunction with law enforcement leaders, is charged with developing standardized sexual assault policies and protocol for

266. *Id.* §§ 2804(a)(1)–(2).

267. *Id.* § 458ccc-1(a).

268. *Id.* § 458ccc-1(d)(2).

269. *See id.* §§ 458ccc-1(d)(1)–(2).

270. *Id.* § 2815.

271. 25 U.S.C. §§ 2810(b)(3)–(5) (Supp. IV 2010).

272. *Id.* § 2802(c)(1).

273. *See* Handler, *supra* note 19.

274. 25 U.S.C. § 2810(b)(2) (Supp. IV 2010).

275. *Id.* § 2802(c)(9).

IHS facilities that are based on Department of Justice protocols.²⁷⁶ The Comptroller General of the United States is also required to conduct a study of IHS facilities and their ability to collect, maintain, and secure evidence of sexual assault to be used in criminal prosecution, as well as provide a report giving recommendations to improve these services.²⁷⁷

F. Response to the TLO

The TLO has been described as “an important step to help the Federal Government better address the unique public safety challenges that confront tribal communities.”²⁷⁸ The National Congress of American Indians (hereinafter “NCAI”) also gave great praise to the TLO.²⁷⁹ President Jefferson Keel of the NCAI stated the law “will set a standard of tough law enforcement in Indian Country.”²⁸⁰ The NCAI highlighted the overwhelming bipartisan support for the TLO and stated that it would have wide-ranging effects on Indian country.²⁸¹ United States Senator Byron Dorgan,²⁸² the author of the TLO, stated that its passage was “great news.”²⁸³ He stated further that the United States has long failed to meet the obligations imposed by treaty and by history toward American Indian Tribes.²⁸⁴ He believes the TLO will “help turn that failure around and is a big step forward in fighting violent crime in Indian Country.”²⁸⁵

Outside Washington, D.C., opinion is, while still hopeful, perhaps more cautious. Some are more guarded in their praise of the law, as when Standing Rock Reservation Tribal Chairman Charles Murphy stated, “I think [the law] is going to make some improvement on our reservation.”²⁸⁶ Others note that while the TLO offers many improvements, some of these improvements place

276. *Id.* § 2814.

277. *Id.* §§ 2802(c)(8)–(9).

278. Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, WHITE HOUSE (July 29, 2010, 5:13 PM), <http://whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>.

279. *Passage of Tribal Law and Order Act Receives Praise from NCAI*, NAT’L CONGRESS OF AM. INDIANS (July 21, 2010), [http://ncai.org/index.php?id=19&type=123&no_cache=1&tx_ttnews\[tt_news\]=751&tx_ttnews\[backPid\]=9&cHash=f60875cffa](http://ncai.org/index.php?id=19&type=123&no_cache=1&tx_ttnews[tt_news]=751&tx_ttnews[backPid]=9&cHash=f60875cffa).

280. *Id.*

281. *Id.*

282. Democrat, North Dakota.

283. Press Release, U.S. Sen. Comm. on Indian Affairs, Senate Passes Dorgan Tribal Law and Order Bill to Curb Reservation Violence (June 24, 2010), *available at* <http://indian.senate.gov/news/pressreleases/2010-06-24.cfm>.

284. *Id.*

285. *Id.*

286. Jenny Michael, *Tribal Law and Order Act Expected to Be Felt on Standing Rock*, THE BISMARCK TRIBUNE, August 15, 2010, at 8A (citing both optimistic statements from politicians as well as cautiously hopeful statements from local officials in North Dakota).

additional requirements and constrictions on tribal courts or simply do not go far enough.²⁸⁷

V. AD HOC MEASURES AND PLATITUTDES: THE EFFECT OF THE TLO ON THE RAPE OF AMERICAN INDIAN WOMEN

A. *Did the TLO Remedy the Jurisdictional Maze?*

The TLO has received wide support from both sides of the political aisle as well as a diverse set of groups ranging from the predictable to the unexpected.²⁸⁸ In total, it stands as a useful piece of legislation. It recognizes the complexity of jurisdiction faced by tribal courts and understands that this must be remedied in order to begin improving the situation on tribal lands. Yet the methods utilized by Congress to remedy the problem reduce the effectiveness of the TLO, especially for American Indian women. The dire situation on some tribal lands requires immediate attention *and* immediate action. The TLO lacks the latter.²⁸⁹ It is a good step forward, but it is incomplete nonetheless. American Indian women deserve more.

Specifically, the TLO provides for better communication between federal and tribal courts and law enforcement. This is done by requiring federal prosecutors to provide tribal prosecutors with all case material and a full report when they decline to prosecute a case under the Major Crimes Act.²⁹⁰ Among law enforcement, the federal deputization of tribal officers will allow them to cut through much of the jurisdictional red tape.²⁹¹ These provisions will allow for better cooperation between federal and tribal authorities. However, they do not ease the complexity of the jurisdictional maze, but rather allow certain

287. See Rob Capriccioso, *Tribal Law and Order Act Costly*, INDIAN COUNTRY TODAY, July 28, 2010, at 1 (pointing out that some benefits are only available after tribes satisfy additional requirements, as when tribal courts can only hand out sentences of three years when they have established required public defender programs based on federal guidelines).

288. 156 CONG. REC. H5864–66 (daily ed. July 21, 2010) (statement of Rep. Sandlin) (noting the bipartisan support for the bill; the American Bar Association predictably sent a letter of support, while other groups, such as the Evangelical Lutheran Church of America, also weighed in support of the legislation).

289. The TLO makes many changes, but the biggest and most important changes that could potentially fix the jurisdictional maze have not been made. See *infra* notes 290–307 and accompanying text. The Indian Law Commission may recommend changes to Congress, but only after a three year review. 25 U.S.C. § 2812(e) (Supp. IV 2010). A new bill will have to be passed based on these recommendations. This will only slow the pace of improvement, which means more American Indian women will be raped.

290. 25 U.S.C. § 2809(a) (Supp. IV 2010).

291. See Eid, *supra* note 257, at 36. Federal deputization will allow tribal officers to more effectively pursue criminals and conduct investigations without having to consider jurisdiction as much. *Id.* Tribal officers will be able to participate in investigations even if the crime falls under the Major Crimes Act because they will be authorized to investigate federal crimes. *Id.*

authorities to pass over it through direct communication. Tribal officers have not received jurisdiction over non-Indians due to their inherent power as police officers of tribal lands, unlike how a New York City police officer has jurisdiction over a tourist to the city. Rather, tribal officers have to seek the power outside of their own departments to control crime within their own jurisdiction. They have received cross-deputization with the federal government²⁹² which does have jurisdiction over non-Indians.²⁹³ It is highly unlikely that many police departments must look to an outside grant of power in order to police their own jurisdiction. Ignoring the maze does not constitute fixing it.

Consider also the requirement for a report from the Indian Law Commission three years after the TLO is signed.²⁹⁴ This report is to detail what the problems actually are, but it seems redundant considering that studies, articles, and reports already cite the jurisdictional maze and suggest ways to fix it.²⁹⁵ These studies point to well researched issues and provide intelligent solutions. Professor Elizabeth Ann Kronk suggests several methods to immediately improve criminal jurisdiction on tribal lands.²⁹⁶ Although her focus is on drug-related crime on Indian reservations, fixing criminal jurisdiction would help to alleviate the plight of American Indian women.

Ever since the decision by the Supreme Court in *Oliphant*, Indian reservations have served as a lawless territory where non-Indians may commit crimes with a much lower chance of being caught and prosecuted.²⁹⁷ Due to their distinction as semi-sovereign entities,²⁹⁸ tribal lands face many of the same issues international borders face,²⁹⁹ a situation that was only exacerbated by the decision in *Oliphant*. The TLO does not effectively remedy the lack of tribal jurisdiction over non-Indians when addressing the attack of American Indian women. It specifically states that “[n]othing in this Act . . . confers on an Indian tribe criminal jurisdiction over non-Indians.”³⁰⁰ The ability of non-Indians to commit crimes in Indian country will remain relatively unchanged.

292. 25 U.S.C. § 2815 (Supp. IV 2010); *see also supra* note 270 and accompanying text.

293. 18 U.S.C. § 1153(a) (2006).

294. 25 U.S.C. § 2812(e) (Supp. IV 2010).

295. *See* AMNESTY INT’L, *supra* note 1, at 61–71; Handler, *supra* note 19, at 278–302; Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1255–70 (2006).

296. *See* Kronk, *supra* note 295, at 1258–71 (arguing for amendments to the Major Crimes Act and the Indian Civil Rights Act, with overruling the *Oliphant* decision, which would give American Indians greater power in Indian country).

297. *See* Eid *supra* note 153, at 40.

298. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (explaining that tribes are “domestic dependent nations” who remain to be separate governmental entities but are still dependent on the federal government).

299. *See supra* note 18 and accompanying text.

300. 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

Indians and non-Indians alike will continue to be tried in federal courts for major crimes that did not occur in that community.³⁰¹ As has been shown, racism, disinterest, and a historical stigmatization of “drunken Indians” hampers the effective prosecution in federal courts of crimes committed on Indian Reservations.³⁰² In the case of the rape of American Indian women by non-Indians, the non-Indians are a part of the community from which the jury and prosecutor are drawn while the women decidedly are not.³⁰³

Professor Kronk suggests that the Major Crimes Act be reformed to allow tribes to undertake jurisdiction over the enumerated crimes.³⁰⁴ This idea is known as an opt-in system, allowing tribes to take over criminal jurisdiction of major felonies once they feel that they are prepared to do so.³⁰⁵ As noted previously, the local prosecutor is best situated to prosecute local crimes.³⁰⁶ Allowing tribes to opt-in to jurisdiction over felonies would allow local prosecutors to prosecute local crimes. Investigations would be easier, witnesses would be more readily available, and prosecutors would act in conjunction with the norms of the tribal community. Additionally, the cultural and geographical distances that result in disinterested juries would be destroyed. Removing the barriers to prosecuting major felonies would combat the jurisdictional maze and help to protect American Indian women from rape.

Even with the removal of the Major Crimes restriction, there remains the obstacle on jurisdiction imposed by the *Oliphant* Court. The TLO made sure to specifically uphold this decision.³⁰⁷ With the jurisdictional complexities currently in place and the TLO’s explicit statement, non-Indians face only marginally greater chances of being prosecuted for raping an American Indian woman.

Professor Kronk posits that jurisdiction over non-Indians was an inherent right of self-determination removed only by policy decisions made by the Supreme Court.³⁰⁸ Congress has previously upheld the tribal right of self-determination.³⁰⁹ Just as French citizens submit to German criminal jurisdiction if they choose to cross the border into Germany, so too should a non-Indian submit to tribal criminal jurisdiction when he chooses to cross onto

301. *See id.* § 2801.

302. *See supra* notes 198–222 and accompanying text.

303. *See supra* notes 202–04, 214–16 and accompanying text.

304. Kronk, *supra* note 295, at 1262.

305. *Id.*

306. Pizzi, *supra* note 125, at 1337–42.

307. *See* 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

308. Kronk, *supra* note 295, at 1267.

309. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100–472, § 301, 102 Stat. 2285, 2296 (codified as amended at 25 U.S.C. § 450(f) cmt. (Supp. IV 2010)) (allowing for Tribal Self-Governance Project).

tribal lands in an attempt to find sex.³¹⁰ By not granting Indian tribes power over all people within their jurisdiction in the TLO, Congress failed to fix the jurisdictional maze and continues to hamper tribal power to protect American Indian women from rape.

Some members of Congress are aware of the incredibly dire situation for American Indian women on the reservation. U.S. Senate Indian Affairs Committee Chairman Daniel K. Akaka³¹¹ presented The Stand Against Violence and Empower Native Women Act (SAVE Native Women Act) to Congress in October 2011.³¹² This bill attempts to provide greater funding to tribal governments to address violent crime directed at American Indian women.³¹³ This is certainly a benefit considering the lack of funding provided by the TLO. Additionally, it would establish a tribal coalition that would work to increase awareness, enhance the response to violence against American Indian women at all levels of government, provide technical assistance to Indian tribes, and assist tribes in developing future legislation that “enhance best practices for responding to violent crimes against Indian women.”³¹⁴ Lastly, the bill would grant greater jurisdiction for tribal courts over matters of domestic and dating violence, but not for the crime of rape.³¹⁵

All of these measures are a step in the right direction. As noted above, additional funding for these issues would provide a great deal of assistance. The coalition would certainly help to address many of the problems of rape on the reservations and may present legislation in the future that will create an even greater difference. It is undeniable that the bill would provide a great benefit for American Indian women who are abused by their non-Indian husbands, boyfriends, and dates. But the bill is only one step forward. It does not provide the solution to the problem of rape. Furthermore, the bill was presented during a time of political stagnation.³¹⁶ There is a worry that the current pre-election climate will allow few bills to be passed quickly.³¹⁷ This bill can serve as one more step to protect American Indian women, but only once tribal courts are granted jurisdiction to prosecute all of the attackers of American Indian women will the protection be complete.

310. *See supra* notes 62–65 and accompanying text.

311. Democrat, Hawaii.

312. Stand Against Violence and Empower Native Women Act of 2011, S. 1763, 112th Cong. (2011).

313. S. 1763 §§ 101, 102.

314. S. 1763 § 101.

315. S. 1763 § 201.

316. *See* Cara Tabachnick, *Tackling Sex Abuse in Indian Country*, THE CRIME REPORT (Dec. 5, 2011, 4:00 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2011-12-tackling-sex-abuse-in-indian-country>.

317. *Id.*

Some may question whether granting this sweeping authority would actually solve present problems. If the removal of the maze simply results in an Indian justice system that is over-taxed and incapable of meeting the demands of criminal jurisdiction, then the effects of granting tribal courts jurisdiction would actually be disastrous. Insufficient resources could perhaps result in a worsening of the current situation. Though granting full jurisdiction to tribal courts may be the ideal to aspire to, it may not be the best option at first.

Initially, a better option may be a partnership between the federal and tribal courts. Federal courts could travel to the reservations where specially trained tribal and federal prosecutors would work together. Federal district court judges in rural districts already travel extensively throughout large, sparsely populated areas to bring judicial services to everyone in that district.³¹⁸ Though this may mean more time away from the bench, it would be in the service of justice. In this way, juries could be drawn more easily from American Indians in Indian country. By being in the community where the crime has occurred, the court would face fewer cultural differences. Additionally, the geographical distance would be greatly reduced, allowing American Indians to participate on juries and making it easier for witnesses to reach the trial. A partnership between federal and tribal courts could combat some of the more dangerous cultural differences that effectively hamper the prosecution of Major Crimes Act crimes and non-Indians committing crimes on Indian reservations. It would give American Indian women a court only miles away, as opposed to hundreds, where they could seek redress while being supported by their communities that have traditionally been an integral part of American Indian society.³¹⁹

Lastly, the TLO has actually served to make criminal jurisdiction more complex in Public Law 280 states. In these states, Indian tribes may now request that the federal government take concurrent jurisdiction over Major Crimes Act crimes.³²⁰ This does not destroy state jurisdiction over criminal matters but rather adds an additional layer.³²¹ Though the idea is to increase the rate of prosecution, this actually seems to increase the complexity of the jurisdictional issue.

318. See Bill Gang, *Rural District Judges Must Spend Much Time on the Road*, NEV. LAW., May 2005, at 16 (detailing the travels of judges in Nevada districts that cover 77,292 square miles).

319. See generally JOSEPH BRUCHAC, *OUR STORIES REMEMBER: AMERICAN INDIAN HISTORY, CULTURE, AND VALUES THROUGH STORYTELLING* (2003) (chronicling personal stories detailing the culture and society of American Indians).

320. See 25 U.S.C. § 2815 (Supp. IV 2010).

321. See 156 CONG. REC. H5866-67 (daily ed. July 21, 2010) (statement of Rep. Lungren).

Even so, the TLO definitely makes improvements to the current jurisdictional scheme. Increased cooperation and communication will help to alleviate many problems to a degree. Unfortunately, Congress did not act to *remedy* the problem, only to alleviate it. Though there is a chance for future action after the report by the Indian Law Commission, this is still several years off. Rather than making sweeping, effective changes, Congress has implemented stop-gap measures to combat the maze of jurisdiction found on tribal lands. These measures will not stop the high rate of rape among American Indian women. In order to do this most effectively, tribal courts must have greater criminal jurisdiction, something the TLO fails to provide.

B. Funding and Sexual Assault Focus

The TLO provides for specific programs to help combat sexual assault on reservations.³²² Acknowledging and addressing the problem will undoubtedly provide some benefit. The mere fact that Congress has noted that the rape of American Indian women is a significant and terrible issue shows that the TLO and Congress are at least headed in the right direction.³²³ Additional education of tribal officers and health workers will assist in handling cases of rape.³²⁴ The additional training will assist the victims as well as increase the ability to build an effective case against the attackers.³²⁵ The most useful measure may be the multidisciplinary teams created by the U.S. Attorney Offices.³²⁶ These teams will provide the much needed focus and education on the issue of rape on Indian reservations.

Despite these focused efforts, the TLO lacks funding. The TLO is authorizing legislation, which means it cannot appropriate any new funds.³²⁷ It does mandate that the executive branch undertake an analysis of the resources available and report back to Congress,³²⁸ so tribal courts and law enforcement may receive additional funds in the future. Unfortunately, tribal police and tribal courts suffer greatly from being underfunded.³²⁹ Though the Act does provide funding for the new Indian Law Commission and other departments

322. *See supra* Part IV.

323. *See* 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

324. *See* Miranda A.H. Horvath et al., *Critical Issues in Rape Investigation: An Overview of Reform in England and Wales*, 1 J. CRIM. JUST. RES. 9 (2011), available at http://www.icjrc.org/yahoo_site_admin/assets/docs/RM210607_PROOF.30214618.pdf (describing attempts to improve police knowledge and training in rape issues to improve investigations).

325. *Id.* at 13–14.

326. *See supra* text accompanying notes 223–29.

327. *Eid.*, *supra* note 257, at 35.

328. *Id.*

329. *See* AMNESTY INT'L, *supra* note 1, at 8, 41, 54; JONES, *supra* note 90, at 1; WAKELING ET AL., *supra* note 160, at vii; 156 CONG. REC. H5866 (daily ed. July 21, 2010) (statement of Rep. Scott).

created within the Department of Justice, no additional funds are provided for the tribal police and courts.³³⁰ By not providing additional funds for tribal police, the first responders to most cases of rape on Indian lands, the TLO fails to provide the tools necessary to effectively combat the rape of American Indian women.

C. A Solution for the Wrong Problem

Congress seems to miss a significant issue in the rape of American Indian women. They face a very different threat than women in the general population. Though they are raped at a slightly higher rate by intimate partners, American Indian women are raped by a man from a different race at a significantly higher rate than women of other races.³³¹ Many of the provisions in the TLO focus on improving the tribal police forces, which will help alleviate rapes by intimate partners who are American Indians as well as Indian acquaintances. Clearly, though, this is not where the only problem lies. Fifty-seven percent of attacks against American Indian women are made by a white man, 10% by a black man.³³² Additionally, interracial marriage and intimate relationships are common for American Indian women, meaning that an attack by a spouse or intimate partner still may not be within the jurisdiction of tribal courts.³³³ This means that a very high percentage of rapes of American Indian women are committed by non-Indians. If the attacker is not an Indian, then the tribal police and courts still do not have jurisdiction over them.³³⁴ When prosecutors decline to prosecute non-Indians who have raped Indian women, there is still little recourse available for these women after the TLO.

Furthermore, the FBI is specifically tasked with investigation of crimes under the Major Crimes Act, one of which is rape.³³⁵ Though tribal officers may gain greater federal powers, the redress for American Indian women must still originate from the FBI, as they are the primary investigators of Major Crimes Act crimes.³³⁶ Rape investigations have not been ceded to tribal officers but are still under the full purview of the FBI.³³⁷

Yet, the TLO has chosen to focus on the improvement of tribal authorities. It does little to combat the issues that arise with a lone FBI agent on the

330. See generally Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258-2301 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., 42 U.S.C.).

331. Bachman et. al., *supra* note 2, at 212.

332. *Id.* at 211 tbl.1.

333. *Id.* at 212, 245.

334. See *supra* notes 18-19 and accompanying text.

335. Eid, *supra* note 153, at 42.

336. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 675-76 (1997).

337. See discussion *supra* Part III.B.3. Nowhere in the Act are the duties of the FBI in regard to investigations of major crimes on tribal lands diminished or even altered.

reservation. These agents are the best trained law enforcement officers in the United States, but they have not been given the cultural knowledge and the special skills that a posting to the tribal lands requires.³³⁸ The TLO does not provide for the necessary additional training for agents.³³⁹ Therefore, it is unlikely that the apprehension of non-Indian attackers living adjacent to the reservation border, or even within the reservation, will increase dramatically. Instead of seeing it as a problem of federal ignorance, the TLO sees the rape of American Indian women as an issue of incompetence and inability of tribal police. By focusing almost solely on tribal law enforcement, the TLO has failed to effectively combat the entire problem, specifically doing little to increase the protection of American Indian women from rape by non-Indians.

Additionally, the establishment of the multidisciplinary teams among U.S. Attorney's Offices that have reservations in their districts will help to bridge the culture gap and focus the fight against rape on tribal lands.³⁴⁰ These programs show that Congress had an understanding of the cultural differences that helped create this problem. The fact that these programs were created for federal prosecutors, but not for FBI agents, shows that the TLO has failed to provide for proper improvement in the investigation of rape on tribal lands even though there was an understanding of what would actually help. Similarly, the TLO has established programs to combat sexual violence on tribal lands by providing education and training for the public on the reservation.³⁴¹ This is certainly an admirable and necessary measure, as many American Indian women are raped by intimate partners. But, as previously noted, this is not the entirety of the problem. Educational programs in Indian country demonstrate further that the TLO has focused on one spectrum, rape committed by American Indian men, while ignoring the major issue of rape by non-Indians. Just as the onus for improvement has been placed on the tribal law officer, these educational programs focus on improving the conduct of American Indian men without developing similar programs for non-Indians living near Indian country.

Lastly, tribal law enforcement will receive greater training and certification in federal law enforcement under the TLO, which is meant to be helpful. Already underfunded and understaffed, however, tribal officers are being asked to perform more functions in addition to the tasks they were already struggling

338. *See supra* notes 182–97 and accompanying text.

339. *See generally* 25 U.S.C. § 2815 (Supp. IV. 2010) (creating law enforcement improvements through retraining of tribal officers and cross-deputization without addressing Major Crimes investigations which are under FBI jurisdiction).

340. *See supra* notes 273–75.

341. *See* 25 U.S.C. § 2810(b) (Supp. IV 2010) (mandating programs to increase education and knowledge of sexual assault on Indian Reservations through the Indian Health Service and law enforcement).

to fulfill.³⁴² Giving overtaxed tribal officers more training and more power does not help the situation when they become overwhelmed with additional duties. Though cross-deputization may serve to help straighten the jurisdictional maze, by placing the onus of improvement on the tribal officers and not expecting the same of the FBI agent, the TLO has provided a solution to the wrong problem.

D. *Drugs Before Rape*

Anti-drug law enforcement is another issue the TLO specifically focuses on.³⁴³ In enacting the TLO, Congress noted the high rate of drug use, trafficking, production, and possession on tribal lands.³⁴⁴ The cross-deputization of tribal officers will allow them to arrest Indian and non-Indian offenders under a wide array of federal drug charges, but nowhere in the TLO has there been a grant of investigatory powers over major crimes like rape.³⁴⁵ Additionally, the punishing powers granted to tribal courts are equivalent to punishment under federal law for the third offense of possession of a controlled substance,³⁴⁶ but again, they cannot exercise this power over non-Indians.³⁴⁷ This does not represent effective punishment power considering than federal law allows for sentences for rape convictions up to life imprisonment.³⁴⁸ The possession of a few grams of cocaine is simply not equivalent to the frequent violent rapes carried out in Indian country.

342. See WAKELING ET AL., *supra* note 160, at 25–27 (detailing the lack of funding, too few officers for too large of geographical area, too few officers to combat the high rate of crime on Indian Reservations, and lack of facilities and equipment to be fully effective).

343. 25 U.S.C. § 2801 cmt. (Supp. IV 2010)).

344. *Id.*

345. See generally Tribal Law and Order Act of 2010, Pub. L. No. 111–211, 124 Stat. 2258–2301 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., 42 U.S.C.). Nowhere in the Act is there a provision that grants tribal police officers jurisdiction over the crimes enumerated in the Major Crimes Act, nor is there any changes made to the Major Crimes Act by the TLO. The law has not been altered in that any person who commits such a crime will continue to “be subject to the same law and penalties as all other persons committing any of [these crimes], within the exclusive jurisdiction of the United States”. 18 U.S.C. § 1153(a) (2006). This means that these crimes will continue to be investigated by the federal investigator (the FBI) and tried by the federal courts.

346. Compare, 25 U.S.C. § 1302(a)(7)(C) (Supp. IV 2010) (increasing tribal courts’ maximum punishing power to three years or a fine of \$15,000), with 21 U.S.C. § 844 (2006) (establishing a maximum punishment of three years in prison and a fine for \$5000 for two or more previous convictions for possession of a controlled substance).

347. “Nothing in this Act . . . confers on an Indian tribe criminal jurisdiction over non-Indians.” 25 U.S.C. § 2801 cmt. (Supp. IV 2010).

348. 18 U.S.C. § 2241(a)(2) (2006).

Tribal police may have more training and more power, but their jurisdiction only covers misdemeanors and non-Major Crimes Act felonies.³⁴⁹ Some say by fighting drug use on tribal lands, this will fight violence against women as well.³⁵⁰ To some extent this is true, but not all addicts are rapists, just as not all rapists are addicts. Rape is not a minor issue to be addressed as a subsidiary of measures combating drug use. It deserves the full attention of Congress. Provisions to fight drugs that are then dragooned into service fighting sexual crimes are insufficient to end the violent crime of rape in Indian country.

Also, in co-opting anti-drug provisions to fight rape and focusing on narcotics policing, the TLO demonstrates that the government is more willing to act to keep crime from coming *from* the reservations than to keep crime from coming *to* the reservation. The production and smuggling of drugs on tribal lands harms tribal members as well as non-Indians outside the reservations.³⁵¹ On the other hand, rape is committed by Indians as well as non-Indians entering tribal lands and the effect remains on the reservation.³⁵² In focusing on anti-drug law enforcement and then using those provisions to help combat rape, the TLO protects against crime coming from the reservation but does not effectively protect against the rape of American Indian women coming to the reservation.

CONCLUSION

An American Indian woman is much more likely to be raped than the average woman in the United States, as a result of historical perceptions, discrimination, and a failure of the American legal system in Indian country. The TLO makes an effort to correct many of these problems, but unfortunately for American Indian women, it is not enough. Increased coordination and more direct focus on rape on reservations will provide some benefit for American Indian women and will mean some improvement for their dire situation. But, it does not provide the full solution. The local police, prosecutors, and courts are best equipped to protect women from rape. When the significance of the reservation border is removed for the non-Indian, there will be improvement. This will be accomplished only when Congress grants tribal police and courts criminal jurisdiction over *all* of their attackers and effectively destroys the barrier to justice created by *Oliphant*. Then may the plight of American Indian women really improve. Though the TLO does improve tribal law enforcement, in failing to significantly improve federal

349. See *supra* Part III.C.3.

350. See Rosenthal, *supra* note 278.

351. Kevin Johnson, *Drugs Invade via Indian Land*, USA TODAY (Aug. 6, 2003, 6:32 PM), <http://www.usatoday.com/news/nation/2003-08-06-indian-drugs-usat>.

352. See *supra* notes 49–57 and accompanying text.

investigation, it fails to close all of the gaps. The Tribal Law and Order Act of 2010 is a step, but it is not the solution to ending the rape of American Indian women.

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