NATIVE PEOPLE AND VIOLENT CRIME

Gendered Violence and Tribal Jurisdiction

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Abstract

Exciting changes are happening in criminal jurisdiction in Indian country at the national level. Due in large part to activism on the part of Native women, Congress has attempted to improve criminal justice on tribal lands. The reforms do not go far enough, however, and many of the recent legal changes have not yet been challenged in the federal courts. This article will preview many of the legal issues likely to ignite a firestorm of litigation and lobbying around issues of crime in Indian country. This article will also wrestle with the difficult question of whether tribal nations should adopt or sustain the typical carceral law and order model used by Anglo-American governments. In an effort to take advantage of the changes in federal law, tribal nations are explicitly required to comply with certain Anglo-American norms. The risks and rewards of such adherence will also be explored.

Keywords: Tribal Governments, Crime, Law Reform, Violence Against Women Act, Tribal Law and Order Act

> *[A] community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination.*
>
> —Kevin Washburn, "Federal Criminal Law and Tribal Self-Determination," *North Carolina Law Review* (2005, p. 779)

INTRODUCTION

Based on multiple reports funded and published by the federal government, it is clear that Native people suffer from one of the highest rates (if not the highest rate) of violent crime in the United States. But the question of *why* Native people suffer from such high rates of violence has not been the subject of in-depth study. This article seeks to answer that question by introducing the reader to some of the fundamental

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tenets of federal Indian law that affect the ability of a tribal nation to take action when violent crime occurs. The article proceeds in three main sections. First, I review the current data that establishes the extremely high rates of violence perpetrated against Native people. Next, I explain the most important federal laws that define and proscribe the criminal authority of tribal nations. The second section explores some of the most important federal reforms to Indian law since 2010. The final section delves into some of the difficult lingering questions in the aftermath of changes made during the Obama administration.

TERMINOLOGY

Any article that discusses American Indian and Alaska Native populations must be thoughtful and deliberate about appropriate terminology. In short, there is no single, agreed upon set of terms and phrases when it comes to tribal populations. While I will use some terms interchangeably, the following list introduces some key vocabulary decisions:

- American Indian and Alaska Native: Refers to the indigenous population of the lower forty-eight contiguous United States and the state of Alaska. I use "Native people" or "Native women" as a shorthand reference to the same population. Note: not all American Indian and Alaska Native people reside on reservations or in Indian country. In fact, most Native people live off-reservation. This article, however, focuses on crimes committed on tribal lands.
- Federal Indian law: An umbrella term describing federal laws that govern the relationship between the federal government and tribal nations, including treaties, statutes, regulations, and case law.
- Indian country: This term-of-art has a specific definition as provided in 18 U.S.C. 1151. There are a variety of lands that can fall under this category—the most obvious and well-known are Indian reservations. This term will be used interchangeably with "tribal lands".
- Tribal Nation: This term is preferred to "Indian Tribe" because it more accurately connotes the status of tribal governments as nations with independent and inherent sovereignty. The federal government currently recognizes more than 560 tribal nations, and there are a significant number of unrecognized tribal nations as well. Each tribal nation has its own distinct government and legal system.
- Sovereignty: The ability of a government to make its own laws and govern itself.
- Jurisdiction: The power of a particular government.

STATISTICS

Since 1999, the United States government has acknowledged that Native people suffer the highest per capita rates of violent crime in the nation (Bureau of Justice Statistics 1999, 2004; Rosay 2016). Empirical studies of rates of victimization in the United States almost universally conclude that Native people suffer violence at extremely elevated rates when compared to the general population (Bachman et al., 2010; Black et al., 2010; Riley 2016). Domestic violence and sexual assault, in particular, are very

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common in the lives of Native women (Oetzel and Duran, 2004; Sapra et al., 2014). Recently released federal reports conclude that *over half* of Native women will experience some form of sexual assault during their lifetimes (Centers for Disease Control and Prevention 2014; Rosay 2016).[1] Studies also indicate that Native children are at a higher risk for child abuse and neglect than other youth (Earle 2000).

In addition to victimization data, we know that Native people suffer a high rate of trauma based on empirical research in other fields, such as psychology, addiction studies, and suicidology. For example, Native people suffer from extremely high rates of Post-Traumatic Stress Disorder (PTSD) (Bassett et al., 2014), substance use (Koss et al., 2003), and suicide (Alcántara and Gone, 2007). All three maladies are common antecedents to violent victimization.

We have one more important data point that deserves special attention and that relates to the racial identity of the perpetrators. Unlike any other racial group in the United States, Native people are more likely to have an attacker who is a member of a different race (Rosay 2016). In the most recent report from the National Institute of Justice, 95% of Native women who were victims of violence reported that they had a non-Native perpetrator. Over 90% of Native men also reported a non-Native perpetrator (Rosay 2016). Native people also commit violent acts against each other, but at rates much lower than those committed by non-Indians (Rosay 2016).

There are a variety of theories as to why Native people are victims of interracial crimes at such high rates. Barbara Perry (2002) argues that Native people are often targeted by criminals *because* of their race—linking the history of ethnocide as federal government policy to the contemporary problem of ethnoviolence. Deborah Miranda (2010) explains that Native women are vulnerable to sexual assault because "Indian bodies are inferior bodies. Indian women's bodies are rape-able bodies. Indian bodies do not belong to Indians, but to those who can lay claim to them by violence" (p. 96). It is also important to note that over 50% of Native women are married to non-Indians (U.S. Census Bureau 2012), which may help explain the extremely high rates of non-Indian perpetrated domestic violence.

But there are concrete legal barriers (discussed in the next section) that serve to protect and insulate non-Indians from accountability. In 2007, Amnesty International released a report (*Maze of Injustice*) condemning the United States for failure to protect Native women from sexual violence, which captured the attention of some lawmakers on Capitol Hill. The report focused on the bizarre patchwork of conflicting and inconsistent laws that make it difficult to hold offenders accountable, particularly non-Indian offenders. As a lawyer, I have spent my career trying to understand the reasons why Native people suffer from such high rates of violence, and to identify possible legal solutions to the crisis. In my recent book, *The Beginning and End of Rape*, I have sought to layout a comprehensive argument for law reform as a method to "end rape" as a common occurrence in the lives of Native women and children (Deer 2015). For the purposes of this article, I will be focusing on the legal structures and barriers that have made it difficult for tribal citizens to find and seek justice in the aftermath of violent crime.

JURISDICTION

Federal Indian law is an entire semester for law students and can be a full time practice area for attorneys. As such, a complete overview of the complicated jurisdictional framework that exists as a result of federal law is beyond the scope of this paper. Instead, I have identified and explained four key laws that are relevant

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to the discussion of violent crime committed in Indian country. To the extent that federal policy and history are relevant to understanding these laws, I have included a brief summation. The jurisdictional framework for Indian country is one of the most confusing areas of American law because the policies of the federal government toward Indian tribes have been inconsistent over the course of the past two centuries (Porter 2007), which makes understanding the maze of tribal criminal jurisdiction difficult. The United States has vacillated widely on its approach to what has been called simply "The Indian problem" over the years (Porter 2007). In the early days of the republic, tribal nations were often characterized as enemies of the federal government, as the Indian Affairs agency was housed in the Department of War, and stated policy was to exterminate or annihilate Indian people. Over the years, federal government policy has changed—at some points during history, the United States has encouraged self-determination, followed by new policies that propose the elimination of tribal government. Laws passed in different eras therefore seem to contradict each other.

As a backdrop to understanding the jurisdictional framework, tribal legal scholars refer to "inherent sovereignty" which is the principle that tribal nations have an independent source for exercising governmental power that does not emanate from the founding documents of the United States (Horse and Lassiter, 1998). Indeed, tribal jurisdiction predates the creation of the American government by thousands of years. In some legal circles, tribes are referred to as "pre-constitutional" or "extra-constitutional" to clarify that the U.S. Constitution does not serve as the foundation for tribal governments. Inherent sovereignty, however, has largely been unilaterally (and many would say, illegally) conscribed by the U.S. government. As a result, tribal nations today do not have the same power that a state or the federal government has in responding to violent crime. Perhaps a better way to frame the issue would be to say that tribal power is not fully *recognized* by the federal government, because most tribal nations have never voluntarily relinquished any particular governmental power. As such, many tribal nations seek federal legal reform to restore what has been unjustly denied. That will be the subject of section 3.

A word of caution for the reader: My discussion of federal Indian law in this section is a mere cursory summation. In Indian law, there are almost always "exceptions to the rule" and other intricate nuances that serve to complicate an already complicated system. Even within a particular state, there can be different federal rules governing particular tribes. As such, one should not rely solely on the information in this article to answer important questions about jurisdiction.

Major Crimes Act: Federal Authority over Indian Country Crimes

In the late nineteenth century, tensions between the United States and tribal nations had reached a fevered pitch, particularly in the Great Plains, leading to frequent military clashes. Federal officials were seeking techniques and tools to help them control the local Native populations and confine them to federally created reservations. One primary reasons tribal nations were difficult to "control" was due to their independent, separate governments which did not fall under the auspices of federal law. So, beginning in the late nineteenth century, Congress began to pass laws that explicitly usurped tribal authority—usually in violation of tribal inherent sovereignty and treaties signed with tribal nations.

The most significant law passed during this time period that still applies in cases of violent crime is the Major Crimes Act (MCA), currently codified at 18 U.S.C. § 1153, passed in 1885. MCA imposes federal criminal authority over certain serious crimes

committed by Native people in Indian country.[2] This puts violent crime in the hands of the Federal Bureau of Investigation, the U.S. Attorney's Offices, and the federal courts.

The backdrop of this statute is noteworthy, particularly when considering how this law applies in contemporary settings. The Major Crimes Act was largely made possible as a result of a controversial Supreme Court case from 1883, known as *Ex parte KAN-GI-SHUN-CA*, (otherwise known as Crow Dog). Crow Dog was a Brule Lakota Indian leader who was accused of murdering another Lakota leader on an Indian reservation in the Dakota territory (Harring 1994). Although the tribal nation had already adjudicated and sentenced Crow Dog, the federal government also sought to prosecute him and sentenced him to death. Crow Dog appealed his federal conviction and capital sentence to the U.S. Supreme Court, arguing that federal laws did not apply to the crime since it happened wholly within the territory of the tribal nation. Surprising to many people, the Supreme Court agreed with Crow Dog, explaining that federal law had no force in Indian country.

Federal officials who sought to control the Indian population used this controversial Supreme Court decision as leverage for a brand new federal law—one that would basically provide the power that the Supreme Court said it lacked. The result was the MCA, a federal law that intrudes on the exclusive authority of a tribal nation to make laws and govern itself. MCA, passed in 1885, is still the primary law by which criminal jurisdiction is delineated on most Indian reservations in the lower forty-eight states. Thus, a law that was originally designed to control Indians is still used today in an effort to protect Indians.

The federal government, however, has a poor track record in terms of responding effectively to violent crime on tribal lands (Casselman 2016; Hermes 2013; Leonhard 2012; Riley 2016). Tribal governments have no legal standing to force the federal criminal justice system to act. Even today, one of the major problems faced by crime victims in Indian country is the high rate of declination of Indian country crimes by federal prosecutors (Hermes 2013). There are a variety of reasons why federal officials have traditionally done a poor job at responding to violence crimes. Part of the problem is the "culture" of the federal criminal justice system which was designed to address major interstate crimes (like white-collar crime or terrorism), not interpersonal violent crime which usually falls under state jurisdiction. Federal officials are also not politically accountable to the tribal nations. During the Obama administration, there began to be a prioritization of Indian country crime for federal prosecutors, such that the past few years have seen an uptick in follow through in the federal system and more transparent communications to tribal nations. But a new policy directive from the federal government can just as quickly turn attention elsewhere. Meanwhile, tribal nations technically retain concurrent jurisdiction over the "major crimes" committed by Native people because the MCA did not explicitly extinguish that authority (and double jeopardy does not apply because a tribe is a separate sovereign entity from the federal government). Some tribal nations pursue these kinds of charges independently, but the federal power has monopolized the response to violent crime.

Public Law 280

The Major Crimes Act stood in place for nearly seventy years. In the aftermath of World War II, the federal policy toward Indian tribes changed to what today is known as the "termination era" (Casselman 2016). The era was as ominous as it sounds. Essentially, the federal government sought to completely eliminate federal recognition of

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tribal governments and to encourage Native people to abandon their tribal lands and assimilate into the 'melting pot' of the United States.

One primary obstacle stood in the way of the plan—what to do with the millions of acres of land known as Indian country. The solution devised by Congress was to simply replace federal criminal authority with state criminal authority. Then, a reservation would simply be consumed by the surrounding state. In 1953, Congress passed what is today known as Public Law 280.[3] Public Law 280 is sometimes described as a Congressional pilot project whereby a few select states were identified in the legislation to replace the federal authority.[4] It conveys criminal authority to several states, essentially dissolving federal responsibility for crime control on those reservations (the MCA still applies to all other reservations).[5]

Unfortunately, Public Law 280 is largely characterized as a failure (Casselman 2016; Goldberg-Ambrose 1997). Tribal nations objected to this change in law, particularly since states and tribes have historically had a tenuous relationship. Moreover, the selected states were suddenly saddled with the authority to police and prosecute large swaths of land with no additional revenue or financial support from the federal government. As a result, states were disinclined to provide effective and sustainable crime control for the reservations it affected. Professor Carole Goldberg (1997, p. 23) has characterized the aftermath as creating "lawlessness" on reservations. Tribal leaders have testified repeatedly in front of Congress that the law is an affront to sovereignty and has led to practical jurisdictional vacuums whereby essentially no effective law enforcement is present. Notably, Congress has never expanded the "pilot project" beyond the original states listed in 1953, indicating again that the approach has been problematic. However, they have also never repealed the statute, leaving a significant number of reservations and Alaska Native villages with ineffective crime control.

Indian Civil Rights Act (ICRA): Limits on Tribal Sentencing Authority

In 1968, Congress significantly limited the ability of tribal courts to impose incarceration and fines as sanctions for criminal violations as part of the Indian Civil Rights Act (ICRA) (Fortin 2013; Kronk 2012). This unilateral federal law was designed to statutorily impose language from the U.S. Bill of Rights (including due process and equal protection) on tribal nations. The necessity and efficacy of the law is still subject to debate. However, Congress added sentencing limitations as well. The original law limited tribal authority to a maximum of six months' incarceration and/or a $500 fine for any offense—including convictions for violent crimes. In the Reagan administration, this was expanded to one year and/or a $5,000 fine as part of the War on Drugs. This limitation remains in place today (with the expansion to three years/$15,000 in the Tribal Law and Order Act, discussed below). The practical impact of this law is that, even if a tribal nation prosecutes a felony violent crime (for example, murder or sexual assault), the maximum penalty that can be imposed by the tribal court hardly matches the type of sentences that can be imposed by state and federal courts. The limitations imposed by ICRA are a major reason why only a few tribes tackle crimes like homicide and sexual assault—the resulting sentence is not appropriate. From the perspective of tribal nations, ICRA does not limit every type of sanction that might be imposed against an offender. ICRA only limits incarceration and the imposition of fines. This means that tribal nations are able to impose countless alternate ways to hold perpetrators accountable, including banishment, restitution, community service, and public or community apologies. Still, when considering crimes like murder and rape, the limitation on incarceration can be seen as a tremendous barrier in putting tribes in charge of crime control.

Oliphant v. Suquamish Indian Tribe: Prohibition Against Prosecuting Non-Indians

To make matters worse, in 1978, the United States Supreme Court issued a devastating decision that has wreaked havoc for Native victims that have the misfortune of being attacked by a non-Indian. The Court ruled that tribal nations are forbidden to prosecute non-Indians for any crime, no matter how heinous. *Oliphant v. Suquamish Indian Tribe* ushered a strangely racialized form of determining a criminal jurisdiction question (Riley 2016).

The story behind the case is as follows: Two white men who lived on the Suquamish Indian Reservation in Washington state were convicted in Suquamish tribal court for criminal behavior, including assault on a tribal police officer. Oliphant and his co-defendant then appealed their conviction to the federal courts, arguing that they should not be subject to tribal authority since they were not members of the tribe and had no right to vote or sit on juries (Krakoff 2011). From a political perspective, this is a peculiar argument that would not work in any other context. Imagine that I, as a Kansas citizen, committed a crime while visiting Oklahoma, Quebec, Canada, or Singapore. All three jurisdictions would unquestionably have the authority to prosecute me. My protest that I am not a citizen of those locales would not receive any credence from the courts (Rolnick 2016).

However, the *Oliphant* court devised a new legal theory out of whole cloth, that is, tribal nations have lost certain attributes of sovereignty due to their dependence on the United States. The Court also overlooked substantial treaties and laws that had affirmed tribal jurisdiction over non-Indians (Leonhard 2012). And the Court ignored the political status of tribes and converted the conversation to be one of race. The decision unilaterally stripped recognition of tribal criminal authority over non-Indians. Many experts believe that this decision largely explains the disproportionate amount of crime committed by non-Indians against Indians. On many reservations, there are far more non-Indians than Indians, but none of them can be held criminally accountable by the tribal nation (Riley 2016). Some observers posit that non-Indian perpetrators became more emboldened after *Oliphant*—seeking out tribal reservations as a low-risk option for committing crime (Casselman 2016).

Unless a tribal police department has been deputized by a neighboring state or federal agency, tribal officials cannot even arrest a non-Indian suspected of committing a violent crime. Critics of the *Oliphant* decision have long argued that it was a poorly reasoned decision for a variety of reasons, including the curious racialization requirement for determining jurisdiction, which seems wholly inconsistent with the American concept of equal protection under the law (Rifkin 2017).

Because the MCA and Public Law 280 provide for concurrent authority over crimes, there is technically a "back-up" for non-Indian crime. In theory, a non-Indian accused of an Indian country crime would fall under federal or state authority (via MCA or PL280). But, as discussed earlier, there is no guarantee that such governments will even investigate, much less prosecute, the crime.

By the close of the twentieth century then, the ability of tribal nations to intercede on behalf of victims of violent crime had been severely hampered by unilateral acts of the federal government (Casselman 2016). Under *Oliphant*, tribal nations were only able to prosecute Native people, and under ICRA, their sentencing authority was limited to a maximum of one year. Moreover, any questions about tribal jurisdiction are resolved through a matrix that would be laughable were it not for the high stakes at issue—requiring an analysis of "the type of crime, exactly where it occurred, the racial identity of the perpetrator and victim, and the nature of their relationship to

each other and to the community…" (Casselman 2016, p. 46). Amy Casselman (2016) argues, that the jurisdictional challenges amount to a "colonial phenomenon that actively *maintains* and *inscribes* colonial violence on the bodies of Native women" (p. 74). Amnesty International (2007) posited that the failure to prosecute sexual assault on tribal lands allowed predators to commit crimes pretty much with impunity.

In terms of federal authority, years of official indifference to the plight of Native crime victims by the federal and state governments left crime victims without a clear avenue for justice. All of these legal factors, combined with the overwhelming poverty experienced in most tribes, are believed to have led to the exorbitant crime rates suffered by Native people today.

In the end, concurrent criminal jurisdiction exercised by the federal or state governments will never truly solve the long term crisis. Chickasaw scholar and former Assistant Secretary for Indian Affairs Kevin Washburn argues that tribal courts are in a better position to address crime because:

> [T]ribal officials have a significant comparative advantage over federal officials in understanding and meeting the needs of Indian country: they are more accountable to tribal constituents, more knowledgable about tribal problems and culture, and, significantly, can often provide federal services more economically and more efficiently than the federal governments (Washburn 2017, p. 207).

There is ample anecdotal evidence that tribes, if provided with the right tools, can do a better job than neighboring governments. Seth Fortin (2013) agrees, pointing out that the Tulalip Tribes in Washington were able to drastically reduce crime on their reservations by implementing their own effective criminal justice reforms. As such, tribal leaders and advocates have begun a long term project to restore tribal sovereignty.

CHANGES TO FEDERAL LAW

Tribal leaders have fought hard to reverse and repeal the unilateral attacks on tribal criminal jurisdiction over the past century, with a series of efforts during the Clinton administration. But it was not until the Obama administration that these efforts began to see sustained concrete success. The reform efforts that began in 2008 were led by Native women and their allies who sought to raise awareness about the high rates of sexual and domestic violence in Indian country and Alaska Native villages (Agtuca 2014; Casselman 2016). Thanks to "media coverage, targeted advocacy, coalition building, and lobbying," Congress began to hold a series of hearings on crime in Indian country starting in the mid-2000s, with efforts ramping up once Obama was elected (Riley 2016, p. 1584). Two major laws restoring a portion of sovereignty were passed during the Obama administration: the Tribal Law and Order Act (2010), and the 2013 reauthorization of the Violence Against Women Act. These remarkable achievements have begun to chip away at the harmful federal laws and policies that have generated such high crime rates, but the federal laws are not without their critics. In the interests of full disclosure, I was one of many people who lobbied for TLOA and VAWA, but here I am interested in a critical analysis that asks direct questions about long term solutions.

Tribal Law and Order Act

In July of 2010, President Obama signed the Tribal Law and Order Act (TLOA). TLOA was a multifaceted piece of legislation with many moving parts, including

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directives to the Indian Health Service and the Department of Justice to improve their responses to crime victims in Indian country. It is considered by some to be *the* most significant reform effort in tribal criminal justice in several decades (Cushner and Sands, 2010; Hermes 2013). For the purposes of this article, I am focusing *only* on the section of TLOA that changes tribal sentencing authority. Recall that ICRA served to limit tribal court sentencing authority to a maximum of one year per offense. Congress justified TLOA on the grounds that the limitation on sentencing authority in ICRA meant that the applications of the law were "not sufficient deterrents to crime in Indian country" (Arnold 2014, p. 4). Now, under TLOA, tribal governments that meet certain benchmarks are authorized to give sentences of up to three years per offence, with the ability to stack sentences for multiple crimes up to nine years. While this reform is a far cry from a full restoration of tribal sentencing authority, the change provides tribal nations with more options for resolving crime. Of course, the three year sentences will only be possible for Native defendants, as nothing changed *Oliphant* until the 2013 reauthorization of the Violence Against Women Act.

2013 Reauthorization of the Violence Against Women Act

The Violence Against Women Act (VAWA) is a comprehensive package of federal legislation originally passed in 1994. VAWA was the first cohesive nationwide federal law that sought to address gendered violence, particularly domestic violence and sexual assault. VAWA was updated and reauthorized in 2000, 2005, and 2013. Each iteration of VAWA has included provisions that addressed domestic violence and sexual assault committed on tribal lands. For the purposes of this article, I will focus on the 2013 reauthorization, which restored tribal jurisdiction over certain non-Indian defendants.

Although efforts to legislatively reverse the *Oliphant* decision had been attempted several times, it was not until 2011 that the U.S. Department of Justice put forth a formal legislative agenda with regard to tribal authority over non-Indians (Leonhard 2012). Building on the momentum of TLOA, the *Oliphant* fix idea finally gained traction in Congress. Activists and tribal leaders used the statistics about non-Indian defendants to argue that the restriction should be dissolved so that tribal nations would have the ability to prosecute anyone, regardless of race, who committed a crime on the reservation. In effect, the proposal was to enact a complete Congressional reversal of the *Oliphant* decision. The proposal was met with stiff opposition from the Republicans in Congress, and for nearly a year, the reauthorization efforts were in limbo (Devreskracht 2013; Rifkin 2017).[6] Republicans raised questionable objections to tribal authority, making unsubstantiated claims that tribal courts could not be trusted to be fair to "outsiders" (Keyes 2013). Over the course of heated negotiations, a compromise emerged that would recognize tribal governments' authority to prosecute non-Indians *only* in cases of domestic violence (including violations of protection orders). This compromise placated some concerns of some opposition, particularly since non-Indian perpetrators of domestic violence have either married a Native woman, dated a Native woman, or had a child in common with a Native woman. In other words, these particular non-Indians, it could be argued, made a conscious decision to fall under tribal jurisdiction.

The fight for VAWA 2013 was not easy. The political rhetoric about tribal governments showcased the persistent ignorance that the average American still holds about Native people and tribal nations. Unlike TLOA, which passed by the House and Senate by wide majorities (Hermes 2013), VAWA 2013 became the subject of the most partisan battle regarding VAWA to date. Clearly racist rhetoric was employed by some members of Congress who claimed, for example, that a tribal jury could not

be fair to a non-Indian (Casselman 2016). Other opposition leaders claimed that tribal courts would most assuredly violate the constitutional rights of non-Indians, without providing any corroborating evidence to support the claim. Some opponents of the *Oliphan*t fix even claimed that the data about violence against Native women was inaccurate, but rarely offered contrary numbers (Devreskracht 2013). Despite this opposition, VAWA 2013 ultimately passed both the House and Senate, and President Obama, who had championed the legislation, signed the law in March 2013.

In the end, VAWA 2013 added new important language to ICRA which explicitly recognizes tribal criminal jurisdiction in cases where a person *of any race* commits an act of domestic violence against a Native person in Indian country (Arnold 2014). Tribal nations were not authorized to begin implementing the legislation within the first two years unless they provided a series of documents to show compliance with the specific requirements outlined in the law. Like TLOA, VAWA 2013 also contains specific requirements and benchmarks that tribal courts must meet in order to exercise the restored authority. In addition, tribal nations still have no recognized authority over non-Indians who commit other crimes, including murder, sexual assault (outside the context of domestic violence), and child abuse.

It is far too early to ascertain whether the changes in TLOA and VAWA will have a demonstrable effect on crime rates on tribal lands. In fact, the first jury conviction of a non-Indian in tribal court did not occur until 2017, four years after VAWA 2013 became law. Implementation has been slow due to the expense of complying with the requirements in federal law and few tribes who are exercising the authority. Under both laws, tribal courts must have particular types of infrastructure in place before the federal government will recognize the restored authority. I focus on these requirements in a later section.

Dollar General v. Mississippi Choctaw

Tribal jurisdiction is not just an issue for the legislative branch. Indeed, several Indian law cases make their way to the Supreme Court every year, and many touch upon the questions of authority over violent crime. In 2015, the Court heard a pivotal case about tribal *civil* jurisdiction in *Dollar General v. Mississippi Choctaw* (2015). Because the origin of the case was a violent crime, the procedure and outcome of the *Dollar General* case is worth reviewing here.

In 2000, the Dollar General corporation (Dolgencorp) established a Dollar General retail store on the Mississippi Choctaw reservation by signing a long-term lease with the tribal government's business arm. In 2003, the Dollar General store hosted several Choctaw youth as part of a summer job program. Unfortunately, the White manager of the store allegedly molested a thirteen-year-old Choctaw youth, who informed his parents of the violation. Because of the *Oliphant* decision, the Choctaw tribe could not prosecute the manager (although he was fired and banished from the reservation). In order to seek some justice for their son, the parents of the victim filed a civil lawsuit in Choctaw tribal court against Dolgencorp in Mississippi Choctaw tribal court to seek money damages for the harm done to their son.

Not surprisingly, Dolgencorp immediately objected to tribal court authority as a "non-Indian." Although the *Oliphant* decision only applies to criminal authority, Dolgencorp argued that the same principles in *Oliphant* should apply to civil jurisdiction as well. The federal case, then, pitted the Choctaw court against the Dolgencorp Corporation. Because a violent crime underlay that dispute, Native women and their allies filed an amicus brief when the case reached the U.S. Supreme Court. They argued that Dolgencorp's interpretation of the law presented clear dangers for Native

women and their children, who would be unable to seek any form of tribal justice (civil *or* criminal) for violent crime should Dolgencorp be successful.

The *Dollar General* case was argued in December 2015, before Justice Antonin Scalia passed away in February 2016. With only eight justices remaining, the Court issued a *per curiam* "tie" decision in June 2016, effectively endorsing the the Fifth Circuit's decision in favor of the Mississippi Choctaw Nation. However, the danger is clear. Tribal nations were only one vote away from losing civil authority over non-Indians, even in the aftermath of the VAWA 2013 *Oliphant* fix. The *Dollar General* tie vote is continuing evidence that tribal authority remains in a state of limbo that is subject to the whims and politics of federal lawmakers and judges. There is no doubt that the substance of the VAWA 2013 *Oliphant* fix will be appealed to the United States in the coming decade.

FUTURE REFORM AND CONCLUSIONS

TLOA and VAWA have not been met with universal praise. To be sure, a great many tribal leaders and advocates fought for TLOA and VAWA 2013. But for some, the legislation raises more questions than it answers. In addition, it is unclear whether President Trump and Attorney General Jeff Sessions (who voted against VAWA 2013 as a Senator) will expend any effort ensuring that victims of violence in Indian country have a clear avenue for seeking justice. Beyond the politics of the moment, however, are more fundamental questions about truly independent tribal sovereignty, the efficacy of federal reform, and the ultimate solutions to the high rates of violent crime experienced by Native people. In that sense, federal reform can be framed as the proverbial double-edged sword (Mullen 2017).

Perhaps the understated aspect of these laws bears special attention—that tribal nations are not required to implement anything. There are no mandates in TLOA or VAWA, only increased options for crime control. Still, the laws could be said to infuse federal Indian law with more paternalism and oversight of tribal nations. In fact, some scholars and observers have argued that the entire premise of laws like the TLOA and VAWA are misplaced. Why would tribal nations expend time and energy to seek remedies and reform from the very government that created the crisis in the first place? Such objections are indeed noteworthy, for they call into question the entire strategy used by many tribal nations and their attorneys today. In essence, by seeking remedy in the federal legal system, we may be implicitly endorsing the power of federal law over tribal governments. Turning to the "Great White Father" for assistance can be experienced as demeaning and internally inconsistent. Moreover, one uncomfortable truth about Congress and Indian tribes is that Congress can just as quickly restrict sovereignty as they can expand it.

On the other hand, federal prohibitions on tribal authority can only be reversed by the federal government itself. If one considers a tribal nation that seeks to reassert authority over non-Indians, for example, there are few options but to fight for change in Congress. Therefore, as we consider the position of tribal nations and violent crime in 2018, we must confront several important questions which are addressed in turn below:

- What (if anything) should future reform seek?
- How will tribal governments find the financial resources necessary to comply with federal law?
- Can tribal nations maintain independent approaches to justice without assimilation?

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Full Restoration of Criminal Jurisdiction

One of the most common questions I receive about the TLOA and VAWA 2013 is "why the arbitrary limits?" TLOA, of course, picks a sentencing limit of three years per crime, which some argue is hardly sufficient when considering the extent of some violent acts. Some critics have noted that there should be no limit at all (Owens 2012). Likewise, VAWA 2013 only applies to domestic violence, dating violence or violations of protection orders. It seems bizarre to have one jurisdictional rule for one set of crimes, and a completely different jurisdictional rule for other types of crimes.

In the case of TLOA, I believe that three years is an effective incremental change, but there is no doubt that it is arbitrary. The concern about VAWA is also cogent, as the limit on the crime of domestic violence is a peculiar outgrowth of the political battle over VAWA 2013. Other bills over the years (and early drafts of VAWA 2013) certainly sought to completely reverse *Oliphant* by enacting clear statutory language that recognizes tribal criminal authority over *all persons* who commit crimes on tribal lands, with no exceptions. The simple truth is that the opposition to such a plan received so much resistance in Congress that the strategy was forced to change. Advocates for VAWA found it necessary to seek compromise in order to move the bill forward. In the end, the restoration of tribal sovereignty over domestic violence crimes was thought to be a "first step"—but an important step based on the crisis Native women are experiencing. However, many observers find the compromise unpalatable for the primary reason that sovereignty should not come in pieces. If the goal is complete restoration of wrested tribal authority, does the slight restoration of tribal authority present philosophical problems? The question, then, is whether advocates for tribal criminal jurisdiction should refuse to compromise and demand full restoration without any limits. Or does the crisis of violent crime compel us to accept incremental changes with the hope that some lives can be saved?

A few tribal leaders have reported that VAWA 2013 has made a difference in their nations, but implementation has been slow. During the two-year pilot project for VAWA 2013, three tribes had a total of twenty-seven cases pursued against non-Indians (National Congress of American Indians 2015). Moreover, the first jury trial under VAWA 2013 actually resulted in an acquittal, establishing from the outset that tribal courts will not be unfair to non-Indians (National Congress of American Indians 2015). The first tribal nation to secure a jury conviction against a non-Indian for domestic violence was the Pascua Yaqui tribe in 2017. To the extent that people believed VAWA would solve the problem of non-Indian violence quickly, it has not been a quick fix. Yet there are reasons to continue to support tribal authority over non-Indians. For example, Chairman of the Pascua Yaqui Tribe of Arizona, Peter Yucupicio, explains generally:

> The first responsibility of any government, tribal or otherwise, is the safety and protection of its people, for there can be no security or freedom for all, if there is insecurity and fear for any of us. Pascua Yaqui tribal officials no longer have to simply stand by and watch their women be victimized with no recourse (National Congress of American Indians 2015, p. 1).

Limiting tribal criminal authority only to crimes of domestic violence, however, will almost certainly not address the breadth of harm caused by non-Indians (Burton 2016; Flay 2017). Legislation is already being introduced to expand the VAWA coverage to include *all* crimes, but particularly sexual assault and child abuse.

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Full Funding to Exercise Criminal Jurisdiction

Many tribal leaders have told me that while the idea of restored jurisdiction is great in theory. The practical matter is that their tribal governments simply cannot afford the costs of running a comprehensive criminal justice system that complies with federal law. To be in "compliance" with VAWA and TLOA, tribal nations must have the appropriate amount of resources to be able to commit to the requirements. Unfortunately, this means that poor tribes simply will not benefit from the changes in law. Among the requirements are:

- Effective assistance of counsel "to at least that guaranteed in the U.S Constitution"
- Defense attorneys for indigent defendants
- Published criminal law, rules of evidence, and rules of criminal procedure
- Maintenance of records of the criminal proceeding
- Rights to a jury trial

While a handful of tribal nations have achieved some level of economic self sufficiency through gaming and other business ventures, the vast majority of tribal nations still suffer from crippling poverty that has marked reservations for well over a century. Tribal economies were, for the most part, destroyed through colonial laws and policies, and today some tribal governments literally have to choose between a hospital or a law enforcement agency. Without adequate funding, ensuring that all requirements are in place requires financial resources that most tribal nations simply do not have (Fortin 2013; Hermes 2013).

The federal government is said to have a "trust responsibility" to tribal nations (Washburn 2017), but current funding levels for essential tribal government services, like justice systems, are often far too minimal to meet even basic needs. The U.S. Commission on Civil Rights issued a scathing 130–page report in 2003 titled "A Quiet Crisis": Federal Funding and Unmet Needs in Indian Country," which concluded that tribal nations are suffering on many fronts because the federal government is financially failing them. Fortin (2013) argues that TLOA really only changes the playing field for wealthy tribes. Thus, future reforms should authorize an appropriate dollar amount to support the efforts of tribal nations that seek to provide criminal justice for their people.

Outstanding Questions about Assimilation and the Western Law and Order Model

Perhaps I have left the most difficult question for the end of this essay: do TLOA and VAWA force tribes to assimilate with the state and federal legal systems? TLOA and VAWA require tribal governments to adhere to certain Anglo-American notions of law and order, with federal oversight to ensure compliance (Casselman 2016; Fortin 2013; Riley 2016). As noted above, TLOA and VAWA require tribal governments to adopt Anglo-American legal norms in order to take advantage of restored jurisdiction.

To be sure, none of the requirements imposed by VAWA and TLOA strike me as bad ideas as an American-trained lawyer—the right to an attorney, for example, seems relatively straightforward. Moreover, many of these principles have long existed in tribal nations already. Some tribes, for example, provide more protection for individual liberties than are provided for in state or federal systems. Still, there are many who find the premise of TLOA untenable, and would rather forego the expanded authority than adopt an American-style court or comply with federal guidelines.

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An additional major critique of TLOA and VAWA is that both laws focus on punitive criminal system's responses. For this reason, many people eschew the legislation as a positive change. For example, Liza Drake Minno (2011) argues "TLOA is a deeply neoliberal piece of legislation that appropriates the honorable work of anti-violence activists in order to fulfill the "colonial dream" of Indigenous fixity and settler control (p. 3). Likewise, Casselman (2016) writes, "TLOA acts out of a colonial fear of the inferiority of tribal justice systems and paternalistically dictates the ways in which Native nations may exert authority" (p. 19). While I disagree with these two writers about the extent of harm that comes with TLOA, these perspectives challenge us to deeply consider the potential downsides of such legislation.

One such example is crystal clear when we consider TLOA's emphasis on incarceration as a tool to address violent crime. Incarceration, in and of itself, has not, and likely will not, be the panacea that will solve the criminal justice crisis on tribal lands. While Native people are the most victimized population in the United States, Native people are also incarcerated in federal and state systems at elevated rates when compared to the general population of the United States. (Bureau of Justice Statistics 1999, 2004; Franklin 2013; United States Commission on Civil Rights 2003). Native people are also sentenced to harsher penalties than non-Indians, primarily because the federal criminal justice system carries longer sentences than state justice systems (Droske 2008; Frosch 2015; Kornmann 2000). Indeed, the carceral criminal justice system has been used as a tool to oppress and marginalize people of color throughout the history of the United States, and Native people are no stranger to this dynamic (Ross 1998).

In fact, the concern about reliance on incarceration and the "law and order" model has been a cogent critique of VAWA from its inception in 1994 (Burns 2013). Women of color, in particular, have criticized the VAWA approach to gendered crime because the central focus is the criminal justice system—a system that has historically done great harm to people of color. In 2013, anti-carceral feminist scholar Beth Richie explained in a recent interview:

> Since the anti-violence movement was operating in the context of a larger movement towards criminalization, it was easy to adopt the solutions of arrest, detention and surveillance. This has been very problematic in terms of the number of women who experience violence and are subsequently arrested. This approach has also sometimes positioned anti-violence work in opposition to the work of communities of color and queer communities who are trying to reduce the imposition of the carceral state in their lives (Burns 2013).

This critique is salient when applied to Native people. It is no secret that the Anglo-American criminal justice system has historically been used as a weapon against us. Recall that the passage of the Major Crimes Act in the late nineteenth century was intended to root out and punish "bad" Indians who opposed the policies of the federal government. For these reasons, many scholars and advocates have expressed deep concern about the trend of encouraging tribal nations to adopt Anglo-American norms (and punishments) as a method to solve crime (Robertson 2012). Angela Riley (2016) notes, "tribes are right to be wary of encroaching laws that seek to turn tribes only into mini models of state or federal tribunals" (p. 1614).

On the other hand, tribal nations themselves have not been a party to the mass incarceration and mistreatment that occurs in the mainstream American criminal justice system. In fact, incarceration, as a concept, did not exist in tribal nations prior to contact with Europeans (Echo-Hawk 1995). Typical traditional criminal justice for tribal nations sometimes did include harsh penalties (including capital punishment)

for serious crimes, but there was no concept of a jail or prison as a way of containing someone's movement. It would be more likely that a perpetrator of violent crime would be banished *from* the tribe than be a prisoner of the tribe. To the extent that tribal leaders conclude that incapacitation (temporary, long term, or permanent) is necessary for at least some violent offenders, perhaps it is not too late to consider whether tribal nations can develop contemporary methods of incapacitation that do not mimic the harsh, unforgiving nature of mass incarceration in the United States.

For example, tribal nations could create therapeutic treatment centers for offenders, using language, culture, and tradition to cultivate a truly rehabilitative system that is designed to reduce recidivism rather than punish for punishment's sake. If tribal nations can conceive of and implement alternative conceptions of incapacitation, this could provide lessons for the world at large, with tribal nations serving as "laboratories of democracy"—free to reconceptualize criminal justice.

It is important to note, however, that nothing in ICRA or TLOA requires tribes to incarcerate at all. While ICRA and TLOA restrict the amounts of incarceration and fines, there is no restriction on the ability of tribes to impose other types of sanctions, and no requirement that tribal courts impose incarceration at all (Fortin 2013). This means that tribal nations can explore countless alternative ways to hold perpetrators accountable, including banishment, restitution, community service, and public or community apologies.

Today, tribal nations find themselves at a curious crossroads. Congress has begun to move toward a restoration of tribal authority, but the federal courts may stand in the way. While TLOA and VAWA do not offer a quick fix to resolve the high rate of violent crime in Indian country, their passage signals an important sea change in the approach to tribal sovereignty. To that extent, the conversations about strategy for tribal crime control become even more important in the next decade. Tribal nations must wrestle with difficult questions about compromise and safety. And while federal law reform is a major part of those conversations, we must also consider how tribal nations can strengthen internal laws to restore what has been lost.

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NOTES

1. The most recent NIJ report from 2016 considered both on-reservation and off-reservation crime—over half of the respondents had lived within reservation boundaries or in an Alaska Native village within the past year.
2. Today, those crimes are murder, manslaughter, kidnapping, maiming, sexual abuse under Ch. 109–A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault on a person less than sixteen years old, felony child abuse or neglect, arson, burglary, robbery, and theft under eighteen U.S.C. § 661. 18 U.S.C. § 1153
3. Public Law 280 (PL280) was codified in scattered sections of the United States Code; thus, we refer to the Public Law number today rather than the United States Code.
4. The states selected for PL280 were Oregon, California, Nebraska, Minnesota, and Wisconsin. When Alaska entered the union, it was added to the list. Other states chose to take some, but not all authority. In 1968, Congress prohibited further application of

PL280 unless the tribal nation consented. No tribe has ever consented to state authority since that time.

5. The federal government retains authority over crimes of general applicability despite Public Law 280.
6. Republicans also objected to new provisions providing more protections to LGBT victims of violence as well as improvements for immigrant victims.

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