

Spring 2021

## Slouching Towards Autonomy: Reenvisioning Tribal Jurisdiction, Native American Autonomy, and Violence Against Women in Indian Country

Joseph Mantegani

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### Recommended Citation

Joseph Mantegani, Slouching Towards Autonomy: Reenvisioning Tribal Jurisdiction, Native American Autonomy, and Violence Against Women in Indian Country, 111 J. Crim. L. & Criminology 313 (2021).

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# **SLOUCHING TOWARDS AUTONOMY: REENVISIONING TRIBAL JURISDICTION, NATIVE AMERICAN AUTONOMY, AND VIOLENCE AGAINST WOMEN IN INDIAN COUNTRY**

Joseph Mantegani\*

*Native American women face rates of sexual violence far beyond those experienced by any other race. But when those women live on reservations, their own tribes are restricted in their authority to protect their members. A maze of criminal jurisdiction overlies Indian country, one that depends on the location of the crime, the agreements a particular tribe has with local or federal authorities, the applicable federal jurisdictional statutes, and the offender's race.*

*Since *Oliphant v. Suquamish Indian Tribe* in 1978, tribes have not had criminal jurisdiction over non-Indians who commit crimes on their reservations. Rather, tribes must rely on state or federal law enforcement to investigate and prosecute any crime committed by non-Indians. Congress has chipped away at the prohibition, but the fact remains: in no other place in America is a perpetrator's race the determining factor in whether they can be prosecuted by the community most impacted by their offense.*

*This lack of jurisdiction and tribal sovereignty takes on a disturbing tone in the context of sexual violence against women. Congress's attempts to remedy the endemic issue have been piecemeal, paternalistic, and wholly inadequate. Even though the issue is still on their mind—there are several pieces of pending legislation addressing sexual violence in Indian Country—the most important steps have not been taken.*

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\* Northwestern Pritzker School of Law, J.D. 2021. Many thanks to Professor Cliff Zimmerman for guiding my thoughts and sharpening my argument; Teresa Manring, Savannah Berger, Cody Goodchild, and the rest of the JCLC staff for thoughtful edits; Professors Erin Delaney and Beth Redbird for exposing me to important areas of tribal law and sovereignty; and Marisa for support throughout.

*This Comment explores the jurisdictional backdrop, the most recent enacted legislation to address the issue, and currently pending legislation. It places that jurisdictional framework in the context of Native American communities, describing how tribes' lack of autonomy exacerbates plights that trace back to early colonialism. Finally, it argues that absent adequate resource allocation, true tribal autonomy, and a return of tribal criminal jurisdiction over non-Indians by overruling Oliphant, tribes will remain treated as second-class in America.*

INTRODUCTION .....	314
I. MAPPING JURISDICTION & LAW ENFORCEMENT IN INDIAN COUNTRY .....	319
A. Sovereignty and the Jurisdictional Backdrop.....	319
1. An Introduction to Tribal Sovereignty .....	319
2. Major Crimes Act.....	321
3. Public Law 280 .....	322
4. Indian Civil Rights Act .....	324
5. Oliphant v. Suquamish Indian Tribe .....	325
B. Recent Jurisdictional Expansion .....	327
1. Tribal Law & Order Act.....	327
2. Violence Against Women Reauthorization Act .....	329
C. Recent Federal Legislation.....	330
II. REENVISIONING TRIBAL JURISDICTION IN THE SEXUAL VIOLENCE CONTEXT .....	335
A. The Roots & Continuation of Sexual Violence .....	335
B. Where Legislation Falls Short .....	339
1. Lack of Focus on Day-to-Day Violence Against Women .....	340
2. SDVCJ's Shortcomings .....	341
3. Statutory Sentencing Limitations .....	343
C. A Look Forward: Proposed Solutions .....	344
1. Overruling Oliphant .....	344
2. Adequate Allocation of Resources .....	345
3. Tribal Autonomy .....	347
CONCLUSION.....	348

## INTRODUCTION

Soon after Diane Millich, a then twenty-six-year-old enrolled member of the Southern Ute tribe, married a white man, her life became one filled

with “beatings and threats, reconciliations and divorce.”<sup>1</sup> At one point, “[a]fter one of his beatings . . . he even called the county sheriff himself” in a grotesque effort to show how powerless law enforcement was: the state had no jurisdiction on the reservation.<sup>2</sup> The proper response would seem obvious: contact police; obtain a restraining order; permit the justice system to do its job. As a white man and non-member of any tribe, though, Ms. Millich’s husband was untouchable on the reservation.<sup>3</sup> She reached out to tribal police, who were powerless to exercise jurisdiction over him; she went to federal authorities, who had jurisdiction but chose not to exercise it.<sup>4</sup> Federal authorities finally asserted their authority, but not until her husband opened fire at her workplace, a Bureau of Land Management office, and wounded a co-worker.<sup>5</sup>

Malign actors purposefully seize on the confusing jurisdictional situation on reservations.<sup>6</sup> In an interview, the author of a book on jurisdiction and sexual violence against native American women described the situation:

In researching my book, I would go into the dark corners of the internet and find chat rooms where rapists and pedophiles would talk to each other about how to commit crimes. One forum was called “How to rape a woman and get away with it.” Something that repeatedly came up was the suggestion that if you’re not a Native person you should specifically target . . . Native people on reservations because you can do whatever you want there. A tribal police officer could even be present and they couldn’t touch you.<sup>7</sup>

Diane Millich’s story and the excerpt above show the complex and intersectional web of racism, sexism, lack of resources, poverty, and

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<sup>1</sup> Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES (Feb. 10, 2013), <https://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-issue.html> [<https://perma.cc/W3TC-VFRW>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

<sup>4</sup> Weisman, *supra* note 1.

<sup>5</sup> *Id.* Diane Millich eventually took center stage at the 2013 signing of the Violence Against Women Reauthorization Act (VAWA), which would have provided a jurisdictional fix for her particular situation. See Emery Cowan, *From Victim to Vocal Advocate*, DURANGO HERALD (Mar. 25, 2013), <https://durangoherald.com/articles/53324> [<https://perma.cc/9GS2-5RLQ>] (describing Ms. Millich introducing Vice President Joe Biden at the Act’s signing). VAWA is discussed *infra* Part II.B.2.

<sup>6</sup> See Jessica Rizzo, *Native American Women are Rape Targets Because of a Legislative Loophole*, VICE (Dec. 16, 2015, 10:00 AM), [https://www.vice.com/en\\_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loophole-511](https://www.vice.com/en_us/article/bnpb73/native-american-women-are-rape-targets-because-of-a-legislative-loophole-511) [<https://perma.cc/4ADB-2CUV>].

<sup>7</sup> *Id.* (quoting Amy Casselman, author of *INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN* (2016)).

jurisdictional gaps affecting Native American women in Indian country.<sup>8</sup> A commonly cited statistic is that one in three Native American women is raped in her lifetime.<sup>9</sup> More recent data paints a much starker picture: an average of 7.2 in 1000 Native women is raped each year, contrasted with 1.9 in 1000 for all races.<sup>10</sup> A 2010 study, conducted by the Centers for Disease Control and Prevention, revealed that “49 percent of Native women report a history of sexual violence.”<sup>11</sup>

These statistics almost certainly do not reflect the true extent of the problem. Experts in the field feel that “federal statistics represent at best a very low estimate.”<sup>12</sup> Anecdotal data also reveal a pervasive, universal impact on Native American women.<sup>13</sup> And there is another factor that distinguishes crimes of sexual violence committed in Indian country from those committed elsewhere: 90% of Native women who are raped are victims of someone of another race.<sup>14</sup>

In the United States, Native American women constitute 1.8% of the missing persons list, despite being 0.8% of the population—a figure that is inevitably “low, given that many tribes don’t have access to the [FBI’s National Crime Information Center] database.”<sup>15</sup> When localized, the figures become more striking. In Montana, Native women are 3.3% of the population, and 30% of the missing girls and women list.<sup>16</sup> North Dakota’s

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<sup>8</sup> Throughout this Comment, I use the term “Indian country” to refer to land on reservations. A fuller, statutory, definition of “Indian country” is found at 18 U.S.C. § 1151 (2012).

<sup>9</sup> SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 1* (2015). That figure, from a 1998 report, is so widespread that President Barack Obama cited it ten years after its publication. *Id.*

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *See id.* (“Through my work in Native communities, I have heard more than once, *I don’t know any woman in my community who has not been raped.*”).

<sup>14</sup> *Id.* at 6; *see also* Ronet Bachman, Heather Zaykowski, Christina Lanier, Margarita Poteyeva, & Rachel Kallmyer, *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 *AUSTL. & N.Z. J. CRIMINOLOGY* 199, 211–12 (2010) (reporting survey results that show 88% of African-American victims reported a same-race offender, 76% of white victims, and only 33% of AIAN victims. Moreover, the AIAN numbers are potentially overreported because the survey grouped Asian-Americans with AIAN offenders).

<sup>15</sup> Sharon Cohen, *Montana Woman’s Disappearance 1 of Many Native American Women Missing or Dead*, *BILLINGS GAZETTE* (Sept. 5, 2018), [https://billingsgazette.com/news/state-and-regional/montana/montana-woman-s-disappearance-of-many-native-american-women-missing/article\\_9d36ec28-ba22-5d30-9764-0f70eb37a287.html](https://billingsgazette.com/news/state-and-regional/montana/montana-woman-s-disappearance-of-many-native-american-women-missing/article_9d36ec28-ba22-5d30-9764-0f70eb37a287.html) [https://perma.cc/22VT-T8S2].

<sup>16</sup> *Id.*

Fort Berthold Reservation illustrates the crisis's root causes: the lack of tribal jurisdiction on reservations, and the Indian country oil boom, such as the boom on the Bakken formation<sup>17</sup>—which is located in part on Fort Berthold.<sup>18</sup> Deer and Warner point to “man camps,” large, temporary camps of transient, often non-Indian, oil workers as a major cause for skyrocketing violent crime rates, including sex trafficking.<sup>19</sup>

Consider this in the context of the practical, day-to-day realities of life and law enforcement in Indian country. As an example, the Fort Berthold reservation, home to around 7,300 people,<sup>20</sup> covers 980,000 acres<sup>21</sup>—roughly the size of Rhode Island. The reservation has a police force of twenty officers, and at times, only two are on duty.<sup>22</sup> Prosecutorial shortages—the tribe has one prosecutor—caused one judge to dismiss 5,000 cases.<sup>23</sup> It's a small wonder that some believe “you can do whatever you want there.”<sup>24</sup> The lack of tribal autonomy, paired in part with the lack of resources and the vastness of many reservations, has contributed directly to the missing and murdered indigenous women crisis.

And the crisis is not abating. In January 2020, sixteen-year-old Selena Not Afraid's body was found a mile from the rest stop where she had disappeared; it took law enforcement three weeks to find her body.<sup>25</sup> A few months before that, eighteen-year-old Kaysera Stops Pretty Places had gone

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<sup>17</sup> Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 74–75 (2019) (“During the past fifteen years, Native women in the United States have found themselves in significant physical danger, which is correlated with an increase in contemporary extractive industries. For example, since the onset of the Bakken oil boom, the number of assault cases in North Dakota increased by over 82%.”).

<sup>18</sup> *Id.* at 76 n.258.

<sup>19</sup> *Id.* at 75 n.254. The Bakken boom is not the sole cause of the overall crisis, but it stands as a useful example of the following principle: when large numbers of unaccountable, temporary residents flood reservations, violent crime follows.

<sup>20</sup> U.S. CENSUS BUREAU, *My Tribal Area*, <https://www.census.gov/tribal/?st=38&aianih=1160> [<https://perma.cc/FMX3-JP7L>] (last visited July 29, 2020).

<sup>21</sup> U.S. DEP'T OF THE INTERIOR, *Fort Berthold Agency*, INDIAN AFFS., <https://www.bia.gov/regional-offices/great-plains/north-dakota/fort-berthold-agency> [<https://perma.cc/EF2K-4MEH>] (last visited July 29, 2020).

<sup>22</sup> Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), [https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm\\_term=.03c9abad8d4c](https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm_term=.03c9abad8d4c) [<https://perma.cc/H6FR-4HJR>].

<sup>23</sup> *America by the Numbers: Episode Four: Native American Boomtown* (PBS television broadcast), <https://www.pbs.org/video/america-numbers-native-american-boomtown/> [<https://perma.cc/MLS6-URCS>].

<sup>24</sup> Rizzo, *supra* note 6.

<sup>25</sup> Nick Martin, *The Cyclical Crisis of Missing and Murdered Indigenous Women*, NEW REPUBLIC (Jan. 22, 2020), <https://newrepublic.com/article/156263/cyclical-crisis-missing-murdered-indigenous-women> [<https://perma.cc/J8BE-7CLA>].

missing in Hardin, Montana, a town that borders the Crow Reservation in the Eastern plains of the state not far from where Not Afraid disappeared.<sup>26</sup> Two days later, her body turned up, allegedly wrapped in plastic, in the backyard of a home less than a mile from the Hardin courthouse.<sup>27</sup>

Not Afraid, Stops Pretty Places, and many other women represent the terminal stage of this endemic problem, one that like any scourge is best eradicated before it manifests. The missing and murdered indigenous women are an extreme end of the spectrum of violence against women. But there are earlier points on this spectrum that, if addressed, can stem the violence experienced by indigenous women. In other words, any attempt to stop the missing and murdered indigenous women crisis cannot focus on the missing and murdered alone; it must also focus on the role of daily violence against women and the lack of power tribes have to protect their most vulnerable citizens. The root causes of the crisis in Indian country—racism, sexism, cultural genocide—are entrenched, and this Comment neither attempts to nor proposes fixes for those root causes. This Comment does, however, argue that limitations on autonomy and jurisdiction prevent tribes from protecting their own citizens and exacerbate these systemic problems.

Part II addresses the jurisdictional backdrop in Indian Country. Section A introduces tribal sovereignty and describes the statutory and common-law background that gave rise to modern tribal criminal jurisdiction over non-Indians. Section B examines two recent Congressional Acts that have attempted to remedy the levels of violence faced by Native American women by granting tribes increased jurisdiction. Section C then examines currently pending legislation that attempts to remedy gaps left from the earlier legislation.

Part III draws attention to how this jurisdictional background and history of legislation impacts culture, daily life, and law enforcement on today's reservations. Section A describes the endemic nature of sexual violence against Native American women, particularly in the context of colonialism, and explains how that history drives the need for increased autonomy. Sections B and C analyze legislative shortcomings, explain how prior jurisdictional legislation has continued to fail Native American women,

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<sup>26</sup> Addie Slinger, *Family Seeks Answers After Crow Woman's Death*, MONT. KAIMIN (Sept. 27, 2019), [http://www.montanakaimin.com/news/family-seeks-answers-after-crow-woman-s-death/article\\_e5056126-e170-11e9-8e87-a7221b9818d4.html](http://www.montanakaimin.com/news/family-seeks-answers-after-crow-woman-s-death/article_e5056126-e170-11e9-8e87-a7221b9818d4.html) [https://perma.cc/LE2X-E5M6].

<sup>27</sup> *Id.*; Julia Jones & Sara Sidner, *Grieving Native American Families Shamed Law Enforcement Over Missing Women and Won Action from President Trump*, CNN (Feb. 27, 2020, 7:32 PM), <https://www.cnn.com/2020/02/27/us/montana-missing-murdered-women-task-forces-sidner/index.html> [https://perma.cc/4FKW-F7KL].

and propose solutions. Specifically, Congress must overturn *Oliphant v. Suquamish Indian Tribe*, properly fund tribal law enforcement, and allow tribal courts to operate as any others would.

## I. MAPPING JURISDICTION & LAW ENFORCEMENT IN INDIAN COUNTRY

### A. SOVEREIGNTY AND THE JURISDICTIONAL BACKDROP

In Indian country, any criminal investigation is hampered by the fact that the race of both the victim and the suspect determine which authority—tribal, state, or federal—has criminal jurisdiction over the case. This way of determining jurisdiction has its roots in both jurisdictional statutes and common law decisions. Several pieces of legislation have further muddled this jurisdictional confusion, primarily the Major Crimes Act,<sup>28</sup> Public Law 280,<sup>29</sup> and the Indian Civil Rights Act.<sup>30</sup> Hovering over all these statutes is the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*,<sup>31</sup> which held that Indian tribal courts do not have “criminal jurisdiction over non-Indians.”<sup>32</sup> Each statute and decision has modified tribal jurisdiction to varying degrees. However, the import of these actions cannot be fully appreciated without first understanding the history of tribal sovereignty.

#### 1. *An Introduction to Tribal Sovereignty*

The history of tribal sovereignty is one of erosion, ongoing since the country's founding. The Constitution contains two references to Indian tribes, both of which allude to sovereignty. First, it states that tribes are not taxed;<sup>33</sup> and second, it assigns Congress the power to regulate commerce with the Indian tribes.<sup>34</sup> The latter power has been construed to grant Congress plenary power over tribal affairs.<sup>35</sup>

Early Supreme Court decisions tentatively upheld tribes' sovereign status, but also emphasized Congress's importance in tribal life. In *Cherokee Nation v. Georgia*,<sup>36</sup> the Marshall Court declared tribes to be dependent

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<sup>28</sup> 18 U.S.C. § 1153 (2013).

<sup>29</sup> 18 U.S.C. § 1162 (2010).

<sup>30</sup> 25 U.S.C. §§ 1301–41 (2014).

<sup>31</sup> 435 U.S. 191 (1978).

<sup>32</sup> *Id.* at 195.

<sup>33</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>34</sup> U.S. CONST. art. II, § 8, cl. 3.

<sup>35</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”) (citations omitted).

<sup>36</sup> 30 U.S. 1 (1831).

nations whose relationship to the United States “resembles that of a ward to his guardian.”<sup>37</sup> And one year later, in “the most important decision in federal Indian law,”<sup>38</sup> *Worcester v. Georgia*,<sup>39</sup> Marshall made clear that there was no role for states to play in tribal relations, and that tribes’ relationship with the federal government did not “strip [tribes] of the right of government” and end their sovereignty.<sup>40</sup>

For years, Congress exercised its power through treaties with tribes, as one nation dealing with another. But in an 1871 appropriations bill, Congress abolished tribes’ ability to make treaties.<sup>41</sup> After striking this blow to sovereignty, Congress drove in the knife in 1887 with the Dawes Act, which remained in force until 1934.<sup>42</sup> The Dawes Act set in motion the allotment era, which aimed to “shatter the tribally held land base.”<sup>43</sup> Under allotment, tribal territory was broken up into discrete land plots, with individual plots granted in trust to individual Indians.<sup>44</sup> Any land left over after allotment was deemed surplus and became available for sale to all—including non-Indians.<sup>45</sup> Not surprisingly, the land allotted to Indians tended to be the worst available.<sup>46</sup> Two-thirds of Indian land disappeared into white hands during allotment.<sup>47</sup>

Allotment ended with the Indian Reorganization Act of 1934,<sup>48</sup> but its effects—loss of land, splintered Indian groups, and a checkerboard plot of land ownership that commingled white landholders with Indian allottees—

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<sup>37</sup> *Id.* at 17.

<sup>38</sup> Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-members*, 109 *YALE L.J.* 1, 10 (1999).

<sup>39</sup> 31 U.S. 515 (1832).

<sup>40</sup> *Id.* at 560–61.

<sup>41</sup> Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71 (1988)). At least one Justice on today’s Court feels that the 1871 Act ended tribal sovereignty altogether. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“[T]he 1871 Act tends to show that the political branches no longer considered tribes to be anything like foreign nations. And it is at least arguable that the United States no longer considered the tribes to be sovereigns.”).

<sup>42</sup> Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 *WASH. L. REV.* 1041, 1065–67 (2012).

<sup>43</sup> *Id.* at 1067.

<sup>44</sup> *Id.* at 1068.

<sup>45</sup> *Id.* at 1067–68.

<sup>46</sup> Natsu Taylor Saito, *Asserting Plenary Power over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 *YALE L. & POL’Y REV.* 427, 440 (2002) (citations omitted).

<sup>47</sup> *Id.*; see also Judith V. Royster, *The Legacy of Allotment*, 27 *ARIZ. ST. L.J.* 1, 12 (1995).

<sup>48</sup> Indian Reorganization Act of 1934, ch. 576, § 1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 5101 (2018)).

remained.<sup>49</sup> The Indian Reorganization Act, however, permitted tribes to organize governments and write constitutions, allowing them to exert some authority over their own affairs. But since the 1970s, the Supreme Court has chipped steadily away at that authority. Today, tribes have no criminal jurisdiction over non-Indians,<sup>50</sup> cannot regulate hunting and fishing by non-members on fee-simple land owned by non-members within their own reservations,<sup>51</sup> have no jurisdiction over disputes between non-members on state highways running through reservations,<sup>52</sup> and cannot tax non-members on fee-simple land owned by non-members.<sup>53</sup> As the repetition of “non-members” in this non-exhaustive list makes clear, tribes continue to lack control over tribal lands.

This history undergirds any discussion of tribal criminal jurisdiction because tribes’ lack of sovereignty prevents them from protecting their own citizens. This Section and the next continue to discuss, in more granular detail, the ways in which this sovereignty has been chipped away in the criminal jurisdiction context.

## 2. *Major Crimes Act*

The Major Crimes Act, passed in 1885, permitted federal criminal jurisdiction over Indians in Indian country for certain enumerated crimes.<sup>54</sup> Today, those crimes include, among others, murder, manslaughter, kidnapping, incest, felony assault, arson, and burglary.<sup>55</sup> The Act was passed in direct response to the Supreme Court’s 1883 decision in *Ex parte Crow Dog*,<sup>56</sup> in which the Supreme Court overturned the federal conviction of Crow Dog for the murder of Spotted Tail on the Sioux reservation (in present-day South Dakota). In that case, a tribal court ordered that Crow Dog pay restitution to Spotted Tail’s family, in accordance with the tribe’s system of

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<sup>49</sup> See Royster, *supra* note 7, at 46 (“Like most tribes, the Crow Tribe of Montana had been subject to the allotment program: tribal lands had been allotted; surplus lands had been sold; and considerable land had passed into non-Indian ownership, leading inevitably to a significant non-Indian presence within the Crow Reservation. As a result of the allotment years, by 1981 more than one-quarter of the Crow Reservation was held in fee by non-Indians.”).

<sup>50</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

<sup>51</sup> *Montana v. United States*, 450 U.S. 544, 566–67 (1981).

<sup>52</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997).

<sup>53</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001).

<sup>54</sup> CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 87–88 (Jerry Gardner ed., 2004).

<sup>55</sup> 18 U.S.C. § 1153.

<sup>56</sup> 109 U.S. 556 (1883).

punishment.<sup>57</sup> The federal government, finding this insufficient, charged Crow Dog with the murder and tried him in a federal district court, which convicted him.<sup>58</sup> *Ex parte Crow Dog* overruled the federal conviction and held that in Indian country, only tribes had jurisdiction over Indians.<sup>59</sup> Congress quickly dispensed with this holding by passing the Major Crimes Act.<sup>60</sup>

In a blow to tribal sovereignty, the Act granted concurrent federal and tribal jurisdiction over its enumerated crimes, even when those crimes only involved Indians and occurred inside tribal borders.<sup>61</sup> While the Act did not strip tribes of any of their jurisdiction, it represented an encroachment on tribes' ability to exercise their autonomous right to govern. If nothing else, the Major Crimes Act made clear that the federal government did not trust tribal justice.

### 3. *Public Law 280*

Seventy years later, Congress further encroached on tribal sovereignty with Public Law 280.<sup>62</sup> Passed in 1953, the law transferred both civil and criminal jurisdiction in Indian country from federal to state authorities in six states, while simultaneously refusing to provide those states with the resources to carry out their new responsibilities.<sup>63</sup> Before Public Law 280, the federal government could prosecute cases if a tribe did not (or could not). After Public Law 280, the ability to prosecute was turned entirely over to the governments of states that enacted it. At the time of passage, enactment was mandatory in Alaska, California, Minnesota, Nebraska, Oregon, and

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<sup>57</sup> Kenneth Factor, *Tightening the Noose on Tribal Criminal Jurisdiction: Duro v. Reina*, 27 TULSA L.J. 225, 229 (1991).

<sup>58</sup> DEWI IOAN BALL, *THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION* 26 (2016).

<sup>59</sup> See 109 U.S. at 571–72.

<sup>60</sup> James Winston King, *The Legend of Crow Dog: An Examination of Jurisdiction Over Intra-Tribal Crimes Not Covered by the Major Crimes Act*, 52 VAND. L. REV. 1479, 1487–88 (1999).

<sup>61</sup> GARROW & DEER, *supra* note 54, at 87.

<sup>62</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2018) and 28 U.S.C. § 1360 (2018)).

<sup>63</sup> *Id.*; see also Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1657 (1998) (“The [six states] received no federal subsidies to ease the financial burden of their new responsibilities, were precluded from taxing reservation lands to raise their own revenues, and received jurisdiction without tribal consent.”).

Wisconsin.<sup>64</sup> Notably, these six states held “359 of the over 550 federally recognized tribes and Native Villages.”<sup>65</sup>

Other states could adopt Public Law 280 piecemeal. Idaho, for example, accepted Public Law 280 only for seven discrete crimes.<sup>66</sup> After Public Law 280, depending on the crime and the state, jurisdiction was split between tribal, state, and federal authorities, with both concurrent and exclusive jurisdiction regimes. And this was one of the simpler jurisdictional schemes in modern Indian country.<sup>67</sup>

But Public Law 280 failed to provide funding for the states that assumed mandatory jurisdiction, leaving these state police departments with larger constituencies, larger geographical jurisdictions, and the same amount of money.<sup>68</sup> With relations between counties and reservations often strained, the pressure that the Act put on states served only to make a halfway solution even worse.<sup>69</sup> Indeed, upon the Act’s passage, President Eisenhower issued a press release lamenting the lack of tribal autonomy provided by the bill. Through his press secretary, he said: “The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians . . . was unfortunate.”<sup>70</sup> He further noted that the Act, in certain situations, prevented Native Americans from self-governing, though his qualms were outweighed by the fact that he saw the law as “another step in granting complete political equality to all Indians in our

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<sup>64</sup> 18 U.S.C. § 1162. Of these six states, several have specific reservations carved out and exempted from the concurrent jurisdiction requirement.

<sup>65</sup> Jimenez & Song, *supra* note 63, at 1634.

<sup>66</sup> ANGLIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 60 (2d ed. 2019); Idaho Code Ann. § 67-5101 (West 2019).

<sup>67</sup> For example, after the Tribal Law and Order Act and the Violence Against Women Reauthorization Act, *see infra* Part II.B, an Indian sexual assault victim could report her attacker to any of tribal, state, or federal authorities depending on several factors. These factors included whether the attack happened on a reservation and whether her attacker was Indian or non-Indian. If her attacker was non-Indian, jurisdiction depended on whether the attack was in a Public Law 280 state and whether her reservation had tribal law enforcement.

<sup>68</sup> EAGLEWOMAN & LEEDS, *supra* note 66, at 60; *see also* Jimenez & Song, *supra* note 63, at 1657 (“These states received no federal subsidies to ease the financial burden of their new responsibilities, were precluded from taxing reservation lands to raise their own revenues, and received jurisdiction without tribal consent.”).

<sup>69</sup> *See* Jimenez & Song, *supra* note 63, at 1636–37 (“[M]embers of Indian tribes in Public Law 280 states suffer both abuses of authority by state governments and a lack of law enforcement responsiveness. For example, in Alaska, tribal justice systems struggle to fill the vacuum caused by the retreat of federal law enforcement and the state’s inability or unwillingness to assume its Public Law 280 responsibilities.”).

<sup>70</sup> Press Release of Statement by the President, James C. Hagerty, Press Secretary to the President (Aug. 15, 1953).

nation.”<sup>71</sup> Oddly, Congress’s goal in shifting jurisdiction from federal to state authorities in certain states is not clear,<sup>72</sup> and Eisenhower apparently held out enough hope that Congress’s lack of clarity did not dissuade him from signing on.

#### 4. *Indian Civil Rights Act*

The Indian Civil Rights Act (ICRA),<sup>73</sup> part of the Civil Rights Act of 1968, mandated that tribal courts abide by certain Bill of Rights protections and restricted the punishments that they could issue.<sup>74</sup> In its most recent version, the Act imposed a limit of up to one year in jail and a \$5,000 fine on tribal sentences of Indian offenders, in addition to requiring tribes to—among other things—provide public defenders, ensure speedy trials, and allow federal writs of habeas corpus.<sup>75</sup> Effectively, tribes were no longer permitted to “hand down felony sentences.”<sup>76</sup> Years later, the Tribal Law and Order Act of 2010 (TLOA), discussed in Part II.B.1, gave tribal courts the power to impose more severe punishments. The Act expanded the statutory sentencing and fine limitations for tribal courts that met due process minimums to three years imprisonment and a \$15,000 fine.<sup>77</sup> But even when regulating intratribal crime, tribal punishment was still limited.

After the TLOA, the ICRA was again amended in 2013.<sup>78</sup> These amendments created “special domestic violence criminal jurisdiction,” which permits participating tribes to exercise limited criminal jurisdiction over non-members who (1) live in their Indian country, (2) are employed in their Indian country, or (3) are a spouse, intimate partner, or dating partner of either an enrolled member of the tribe, or a member of a different tribe who lives in the participating tribe’s Indian country.<sup>79</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Jimenez & Song, *supra* note 63, at 1658 (“The problems caused by Public Law 280 directly result from its ambiguous legislative history, imprecise drafting, and lack of an express statement of the statute’s objective.”).

<sup>73</sup> 25 U.S.C. §§ 1301–04.

<sup>74</sup> See *EAGLEWOMAN & LEEDS*, *supra* note 66, at 49.

<sup>75</sup> *Id.* at 49–50; 25 U.S.C. §§ 1302(a)(6), 1303. When Congress originally passed the ICRA in 1968, it permitted “six months’ imprisonment and not more than \$500 in fines ‘for conviction of any one offense.’” Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 *UCLA L. REV. DISCOURSE* 88, 91 (2013).

<sup>76</sup> Fortin, *supra* note 75, at 90.

<sup>77</sup> *Id.*; 25 U.S.C. § 1302(b).

<sup>78</sup> See *infra* Part II.B.2. This time, the amending act was the Violence Against Women Reauthorization Act.

<sup>79</sup> 25 U.S.C. § 1304(b)(4)(B).

In short, the ICRA's passage in 1968 allowed for a bit more tribal autonomy. Its subsequent amendments in 2010 and 2013 continued to tinker with autonomy, in places expanding it while simultaneously conditioning it. But any exercise of tribal autonomy still required adherence with external limitations—including constitutional safeguards—on tribal justice systems. But those external limitations operated more as a cudgel than a check: Congress did not see the Bill of Rights alone as a sufficient protector against tribal process. Indians, Congress felt, needed more oversight than the Constitution.

### 5. *Oliphant v. Suquamish Indian Tribe*

But the biggest barrier to tribal autonomy is the Supreme Court's decision in *Oliphant*.<sup>80</sup> In that case, Oliphant—a white non-member of the Suquamish Tribe who lived on their reservation—"was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest."<sup>81</sup> After arraignment in the tribal court, Oliphant applied for habeas corpus in federal court, arguing the tribe had no jurisdiction over non-Indians.<sup>82</sup> Both the district court and the Ninth Circuit disagreed.<sup>83</sup> But in a sweeping decision, the Supreme Court reversed both courts and declared that tribes have no criminal jurisdiction over non-Indians.<sup>84</sup>

Practically speaking, the decision forbade tribes from exercising any criminal jurisdiction over non-Indians.<sup>85</sup> The effect of this, for our purposes, is that if a non-Indian rapes an Indian woman on Indian land, even if there is no question of guilt, the tribe must rely on either state or federal officials to carry out any punishment. Writing for the Court, Justice Rehnquist concluded that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."<sup>86</sup> The Court reasoned that because criminal jurisdiction over non-Indians was "'inconsistent with [tribes'] status as dependent nations,' [that

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<sup>80</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>81</sup> *Id.* at 194.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 194–95; *see also* *Oliphant v. Schlie*, 544 F.2d 1007, 1013 (9th Cir. 1976) ("If tribal members cannot protect themselves from offenders, there will be powerful motivation for such tribal members to leave the Reservation, thereby counteracting the express Congressional policy of improving the quality of Reservation life.").

<sup>84</sup> *Oliphant*, 435 U.S. at 212.

<sup>85</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 128 (2004).

<sup>86</sup> *Oliphant*, 435 U.S. at 212.

jurisdiction was] extinguished when the United States was founded.”<sup>87</sup> To permit tribes to exercise criminal jurisdiction over non-Indians would be “inconsistent with the founders’ great concern for citizens’ personal liberties.”<sup>88</sup> The reasoning is much-maligned,<sup>89</sup> but a full criticism of the case is beyond the scope of this Comment.<sup>90</sup>

An understanding of *Oliphant*, more so than any other piece of the jurisdictional puzzle, is crucial to understanding the erosion of tribal sovereignty. The Suquamish had provided a “fully functioning Western-style court system” to *Oliphant*, but this was nonetheless insufficient to the Supreme Court.<sup>91</sup> *Oliphant* treats tribes as permanent outsiders: even when they have acquiesced to the standards prescribed by federal law, they remain untrustworthy. This result inevitably raises the question of what level of “civilizing” can “trump the enduring myth of Native savagery.”<sup>92</sup>

The decision has also left tribes helpless in the face of non-Indian criminals. Until subsequent statutes chipped away at the jurisdictional bar in narrow situations,<sup>93</sup> *Oliphant* served to “strike[] directly at the heart of a tribe’s ability to protect itself.”<sup>94</sup> And the decision still does this in many criminal situations. Whereas every other American community can empower its police force with the authority to protect it, tribes cannot.<sup>95</sup>

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<sup>87</sup> Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 398–99 (1993).

<sup>88</sup> *Id.* at 399.

<sup>89</sup> *See id.* at 396 (“The Court’s justification for scaling back Indian sovereignty is even more troubling than the holding itself.”).

<sup>90</sup> *See, e.g.*, Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 179, 212–38 (2018) (criticizing *Oliphant* for, among other things, its reliance on the questionable precedent of *Johnson v. M’Intosh*, 21 U.S. 543 (1823)); Larry Cunningham, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2195 (2000) (“Scholars criticized Justice Rehnquist’s opinion as a ‘novel departure from the basic tenet of Indian law . . . that Indian tribes retain inherent sovereignty over internal affairs absent express abrogation by Congress.’”); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 267–74 (1986) (analyzing *Oliphant* through the lens of how much latitude the federal government grants tribes to develop non-Western practices).

<sup>91</sup> AMY L. CASSELMAN, *INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN* 38 (2016).

<sup>92</sup> *Id.*

<sup>93</sup> *See infra* Part II.B.

<sup>94</sup> Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History*, 19 WICAZO SA REV. 9, 19 (Fall 2004).

<sup>95</sup> *Id.*

## B. RECENT JURISDICTIONAL EXPANSION

Unsurprisingly, this patchwork jurisdiction has drawn attention. Congress has attempted, on several occasions, to address the jurisdictional issues that contribute to the shocking rates of violent crime against Native women, targeting both day-to-day violence and the missing and murdered indigenous women crisis. Two primary statutes took on the issue, one passed in 2010 and one in 2013; both amended the Indian Civil Rights Act. The Tribal Law and Order Act of 2010 (TLOA) increased sentencing limits, while 2013's Violence Against Women Reauthorization Act (VAWA) provided the first steps away from *Oliphant*. Both statutes have been active long enough at this point to permit evaluation of their efficacy, and more importantly, a clear view of where they fall short.

### 1. Tribal Law & Order Act

In 2010, Congress took a tentative step towards increased tribal autonomy by passing the TLOA. The law grants more power to tribal law enforcement and prosecution teams, attempts to simplify jurisdiction, and includes measures directed specifically at assisting Native women.<sup>96</sup> But many of these improvements are conditioned. For example, tribes must provide counsel to indigent defendants and other such protections in order to avail themselves of the Act's increased sentencing limits, a costly proposition.<sup>97</sup> The Act provides some funding, but it is typically inadequate and poorly distributed.<sup>98</sup> As a result, tribes often must find some other source of funding or simply provide inadequate services.<sup>99</sup>

One of TLOA's "most important and controversial provisions" is its grant of sentencing authority increases to some tribes.<sup>100</sup> The increases allow tribes that offer adequate due process to criminal defendants to treble the

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<sup>96</sup> Samuel D. Cardick, *The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women*, 31 ST. LOUIS U. PUB. L. REV. 539, 564–67 (2012). There are four specific measures that assist Indian women: a directive to create teams to "focus on combating sexual violence offenses against Indian women," specialized training, a directive to form standardized protocols and sexual assault policies, and a required inspection of Indian Health Service facilities to determine how effective their "ability to collect, maintain, and secure evidence of sexual assault" is. *Id.* at 566–67.

<sup>97</sup> Fortin, *supra* note 75, at 96–97.

<sup>98</sup> *Id.* at 97 ("Evidence is strong that tribes either do not know money is available or are using nominally available funds for other purposes.")

<sup>99</sup> *Id.* at 97–99. Some creative solutions include partnering with a nearby law school to provide indigent defense, as Washington's Tulalip Tribes did with the University of Washington, *id.* at 98, and taking advantage of gaming revenue. *Id.* at 99.

<sup>100</sup> Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 172 (2010).

ICRA's sentencing limits. Now, they can sentence defendants to three years' imprisonment, and issue fines of up to \$15,000.<sup>101</sup> The required due process protections included that tribal judges be admitted attorneys and that tribal courts provide public defenders to criminal defendants.<sup>102</sup> These may seem rudimentary, but they are costly. The latter requirement obviously requires money, and while the TLOA included some federal grants that provided funding for public defenders, those grants were minuscule compared to grants that were aimed elsewhere, generally at more punitive measures.<sup>103</sup> The focus on "solutions" like building new jails made plain that tribal autonomy in sentencing was not a focus of the Act.<sup>104</sup>

The TLOA creates a paper solution: in response to a crisis, the Act provides funding for tribal law enforcement training and construction of jails. But the offenders arrested by those police and placed in those jails cannot be adequately handled by the overburdened tribal justice system. Everyone can see the construction of a new jail, and feel that their concerns are being addressed, but the TLOA's solution is directed at everyone but the victims. Even its name—"Law and Order Act"—conjures images of police crackdowns, ones whose object is jailing criminals rather than helping victims.

In essence, the TLOA gives tribes a mirage of self-determination with one hand, while simultaneously reining in their ability to protect their own citizens with the other. But some tribes may be reluctant to participate in the TLOA's requirements, either due to a lack of resources or for reasons of autonomy, like a desire (or mandate) to "maintain[] . . . ways of life that predate the Constitution."<sup>105</sup> This is the difficulty with the TLOA's half-measures: legally speaking, they make tribes neither fully American, nor fully sovereign; rather, they place tribes in a kind of jurisdictional purgatory.

We are too late in the game to start over and reestablish tribes as independent nations able to fully exercise their criminal (and civil) jurisdiction. But given the history of colonialism and cultural genocide, some semblance of independence and sovereignty must emerge. In the way that

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<sup>101</sup> *Id.* at 172–73.

<sup>102</sup> *Id.* at 173.

<sup>103</sup> Fortin, *supra* note 75, at 97–98.

<sup>104</sup> *Id.* The other grants permitted in the TLOA were for drug enforcement, police training, "grants to build jails, grants for delinquency prevention, and grants to improve information sharing systems between law enforcement agencies." *Id.*

<sup>105</sup> *Id.* at 99–100. As an example of the mandate, the Cherokee Constitution contains an oath that all officers must take. Officers promise to "do everything within [their] power to promote the culture, heritage and traditions of the Cherokee Nation." CHEROKEE CONST. art. XIII.

Illinois can arrest and prosecute a non-Illinois resident who commits a crime within its borders, tribes should, at the very least, have the same authority.<sup>106</sup> The TLOA was a start. But after its passage, questions remain. Should tribes have uncapped prosecutorial and sentencing authority, allowing them to exercise full control of their land? To what degree should tribal, state, and federal cooperation be required? Should such cooperation even occur?

## 2. *Violence Against Women Reauthorization Act*

Several years after the TLOA, Congress more directly addressed violence faced by Native women. The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) amended the ICRA in a way that permitted, for the first time since *Oliphant*, criminal jurisdiction over non-Indians.<sup>107</sup> But the classes over whom this “special domestic violence criminal jurisdiction” (SDVCJ) permits jurisdiction are quite narrow. Only those who live or work in the relevant Indian country, or who are intimately involved with members of the relevant tribes, fall within it.<sup>108</sup> The Act does not allocate SDVCJ out of a concern for the practical realities of policing Indian country. Rather, it allocates this jurisdiction on grounds of inherent tribal sovereignty.<sup>109</sup> Thus VAWA 2013 makes clear that Congress *can* restore the inherent sovereignty that *Oliphant* stripped, and it is willing to exercise that authority, albeit in a piecemeal manner.

Like with the TLOA, there are guardrails on the expansion of tribal criminal jurisdiction under VAWA 2013. First, the perpetrator must be a non-Indian with some tie to the tribe, and the offense must fall into “any of the following categories: domestic violence, dating violence, or violations of

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<sup>106</sup> There are certainly examples of tribal and state authorities cooperating that show that concurrent jurisdiction—that is, two sovereigns having jurisdiction over a single area—is a workable solution. *See, e.g.*, Brief of *Amici Curiae* Tom Cole et al. in Support of Petitioner at 4, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526) (“For more than two decades, the [Chickasaw and Choctaw] Nations’ sovereign authority within their Reservations and commitment to the cooperative exercise of that authority have provided the framework for the negotiation of agreements that provide legal certainty, economic stability, and a better quality of life for all Oklahomans.”).

<sup>107</sup> 25 U.S.C. § 1304(b)(4).

<sup>108</sup> 25 U.S.C. § 1304(b)(4)(B); *see also* Dayna Olson, *Protecting Native Women from Violence: Fostering State-Tribal Relations and the Shortcomings of the Violence Against Women Act of 2013*, 46 HASTINGS CONST. L.Q. 821, 822 (2019).

<sup>109</sup> BALL, *supra* note 58, at 180–82 (“The House thought it was ‘noteworthy’ in *Oliphant* that the Court suggested that Congress had the constitutional authority to restore inherent tribal sovereignty for them to exercise jurisdiction over non-Indians. . . . Under [SDVCJ], inherent tribal sovereignty allows tribes to prosecute Native Americans and non-Indians suspected of domestic violence.”).

protection orders.”<sup>110</sup> Because VAWA 2013 focuses on pre-existing relationships, a notable omission here is random “stranger” violence. For example, if a Native woman is attacked by a man she meets out at night or by an attacker hiding in the proverbial alleyway, tribes cannot prosecute the perpetrator.<sup>111</sup> Also omitted are so-called quality-of-life crimes. Drugs, drunk driving, vandalism—all are outside the scope of SDVCJ. Tribes remain reliant on state or federal authorities for maintaining general order.

Second, VAWA 2013 requires that tribes provide procedural safeguards. The offender has a right to a jury, which can include non-Indians, and any convictions handed down under SDVCJ are subject to federal habeas review.<sup>112</sup> The Act also contains a catch-all provision, affording an SDVCJ defendant “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”<sup>113</sup>

Thus, VAWA’s 2013 reauthorization took a step towards addressing daily, endemic violence against women.<sup>114</sup> Further, VAWA 2013 and the TLOA mark a move towards tribal autonomy. By allowing tribes to exercise their own forms of criminal punishment and jurisdiction, they directly confront Congress’s fear in passing, and maintaining, the Major Crimes Act.<sup>115</sup> VAWA’s 2013 reauthorization also marked the first legislative attempt at eroding *Oliphant*,<sup>116</sup> and perhaps opens the door for further chipping away at the decision. But both Acts miss the mark in significant ways.

### C. RECENT FEDERAL LEGISLATION

VAWA 2013 and the TLOA left gaps and open questions. First, the allocation of SDVCJ when the victim is the “spouse, intimate partner, or

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<sup>110</sup> EAGLEWOMAN & LEEDS, *supra* note 66, at 55.

<sup>111</sup> See Olson, *supra* note 108, at 838 (“The SDVCJ has been dubbed a ‘partial’ *Oliphant* fix, in that child abuse, elder abuse, and sexual assault by a stranger—unless either one of these crimes violates a preexisting restraining order—are not covered by the expanded criminal authority of the tribes.”).

<sup>112</sup> EAGLEWOMAN & LEEDS, *supra* note 66, at 55.

<sup>113</sup> 25 U.S.C. § 1304(d)(4).

<sup>114</sup> See, e.g., EAGLEWOMAN & LEEDS, *supra* note 66, at 55; BALL, *supra* note 58, at 181–82.

<sup>115</sup> See, e.g., *United States v. Other Medicine*, 596 F.3d 677, 680 (9th Cir. 2010) (“The Major Crimes Act permits the federal government to prosecute Native Americans in federal courts for a limited number of enumerated offenses committed in Indian country that might otherwise go unpunished under tribal criminal justice systems.”) (citations omitted).

<sup>116</sup> BALL, *supra* note 58, at 181–82.

dating partner” of a non-Indian, while admirable, fails to account for the fact that Native women are “more likely to be victims of assault and rape/sexual assault committed by a stranger or acquaintance rather than an intimate partner or family member.”<sup>117</sup> That is to say, their attackers do not fall under SDVCJ. Second, the Acts raise issues of allocation of power. In order for tribes to punish offenders beyond the TLOA or VAWA 2013 ceilings, they must resort to agreements with state or federal authorities and rely on those authorities to prosecute. This becomes especially problematic when tribes do not trust local or federal governments.<sup>118</sup> Third, the Acts did little to remedy the underreporting of missing Native American women, which often occurs simply due to lack of access to or incompatibility with state and federal databases.<sup>119</sup> The underreporting problem is so widespread that “[a]n Urban Indian Health Institute [study] found that of 5,712 reported missing Native women and girls in 2016, only 116 had been logged in [the Department of Justice’s] database.”<sup>120</sup>

In response to these gaps, several pieces of federal legislation have been proposed in recent years, in particular Savanna’s Act<sup>121</sup> and the Not Invisible Act.<sup>122</sup> Each proposed Act attempts to remedy the crisis by addressing distinct gaps—primarily in communication and jurisdiction—but each inevitably falls short. Their shortcomings manifest in different ways, each of which comes back to a single common thread: failure to adequately address underlying causes.

#### 1. Savanna’s Act

One of the gaps Congress has tried to address is an information gap. Savanna’s Act was initially introduced in 2018 and was unanimously

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<sup>117</sup> STEVEN W. PERRY, U.S. DEP’T OF JUST., AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 v (2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf> [<https://perma.cc/G2A4-K7WS>].

<sup>118</sup> This includes several sub-issues: tribes are often reluctant to trust governments who have broken agreements with them in the past, they sometimes perceive state or federal officials as deprioritizing issues affecting tribes, and it can undermine the spirit of a tribe to be forced to rely on outsiders to preserve their own safety.

<sup>119</sup> *S. Hrg. 116-67 S. 227, S. 288, S. 290, S. 982, & S. 1853: Hearing Before the Comm. on Indian Affairs*, 116th Cong. 29–39 (2019) (statement of Hon. Lynn Malerba, Secretary, United South and Eastern Tribes Sovereignty Protection Fund) [hereinafter Malerba statement].

<sup>120</sup> *Id.* at 37.

<sup>121</sup> S. 227, 116th Cong. (2019).

<sup>122</sup> S. 982, 116th Cong. (2019).

approved by the Senate, but the House never voted on it.<sup>123</sup> Senator Lisa Murkowski reintroduced the bill in 2019 with identical text to the original, and with input from several Native authorities.<sup>124</sup> The Act had clear support: its bipartisan Senate sponsors included each senator from several states with high proportions of Native American citizens, and its House equivalent included all four Native American members of the House as cosponsors.<sup>125</sup> Its second iteration passed both houses of Congress, and the President signed it into law on October 10, 2020.<sup>126</sup> It directs the Department of Justice to train employees on the entry of Native American women into missing and unidentified persons databases, conduct outreach to tribes on how to enter missing women into databases, develop guidelines for missing persons cases, train and assist tribes on implementing the guidelines, report statistics on missing and murdered indigenous women, and have the FBI include gender in its annual statistics of missing and murdered persons.<sup>127</sup> Practically speaking, the bill is aimed at data collection—a necessity, given the severe underreporting of missing Native women.<sup>128</sup>

Committee hearings addressing the legislation also laid plain numerous data-collection issues. Databases used by tribes do not necessarily match those used by state or federal governments.<sup>129</sup> For example, tribal affiliation is not a data entry field in state and federal databases.<sup>130</sup> Additionally, there are problems with limited resources, merging databases, and simply providing training on proper data entry.<sup>131</sup> And even if all these issues are resolved, “[s]ome tribal governments may be hesitant to broadly share tribal law enforcement data, due to troubled histories with local and state law enforcement officers and tribal residents.”<sup>132</sup> Ultimately, Savanna’s Act puts

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<sup>123</sup> Jenna Portnoy & Felicia Sonmez, *Before Leaving Office, Rep. Bob Goodlatte Blocked a Bill Intended to Help Abused Native American Women*, WASH. POST (Dec. 27, 2018, 2:53 PM), [https://www.washingtonpost.com/local/virginia-politics/before-leaving-office-rep-bob-goodlatte-blocked-a-bill-intended-to-help-abused-native-american-women/2018/12/27/f4872d50-09f3-11e9-85b6-41c0fe0c5b8f\\_story.html](https://www.washingtonpost.com/local/virginia-politics/before-leaving-office-rep-bob-goodlatte-blocked-a-bill-intended-to-help-abused-native-american-women/2018/12/27/f4872d50-09f3-11e9-85b6-41c0fe0c5b8f_story.html) [https://perma.cc/VFU4-5AQA].

<sup>124</sup> S. 1942, 115th Cong. (2018); S. 227, 116th Cong. (2019).

<sup>125</sup> H.R. 2733, 116th Cong. (2019).

<sup>126</sup> 134 Stat. 760 (2020).

<sup>127</sup> H.R. 2733, 116th Cong. (2019).

<sup>128</sup> Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing “Indigenous Data Sovereignty”*, 80 MONT. L. REV. 229, 254 (2019).

<sup>129</sup> S. Hrg. 116-67 S. 227, S. 288, S. 290, S. 982, & S. 1853 Hearing Before the Comm. on Indian Affairs, 116th Cong. 13 (2019).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Tsosie, *supra* note 124, at 255.

all the parties in a room. But it does little to address the underlying factors that have kept the parties apart for so long.

### 2. Not Invisible Act

The Not Invisible Act, which also became law on October 10, 2020, seeks to mend those trust gaps and act as a complement to Savanna's Act.<sup>133</sup> It directs the Bureau of Indian Affairs to designate an official to take charge of tracking missing and murdered Native Americans.<sup>134</sup> That official will coordinate with outside groups who have experience dealing with various tribes to provide training.<sup>135</sup> Lastly, it creates an advisory committee aimed at addressing "violent crime within Indian lands and of Indians" that makes non-binding recommendations to both the Secretary of the Interior and the Attorney General.<sup>136</sup>

The latter directive is the primary sticking point with the Act, as some feel that it fails to properly create interagency communication between the Department of the Interior and the Department of Justice.<sup>137</sup> Another view is that the Act will "provide a mechanism for Tribal Nations, Native people, and others with relevant expertise to advise the federal government on combatting violent crime within Indian Country and against Native people, addressing some of the historical trauma that leads to crime in Indian Country."<sup>138</sup> Data collection, of course, is crucial to establish the scope of the problem. But the Act fails to prescribe how this data will be used. Seeing the full scope of a problem is one thing; providing the necessary jurisdictional, financial, and self-determinative steps to help resolve that problem is another.

### 3. Other Federal Legislation

There are several ancillary pieces of legislation currently pending in Congress. One aims to include crimes against children and law enforcement officers in the SDVCJ.<sup>139</sup> Another's goal is to improve the infrastructure of missing persons databases so as to improve coordination.<sup>140</sup> And a third bill

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<sup>133</sup> 134 Stat. 766 (2020).

<sup>134</sup> *Id.* § 3(a)(1).

<sup>135</sup> *Id.* § 3.

<sup>136</sup> *Id.* § 4.

<sup>137</sup> *S. Hrg. 116-67 S. 227, S. 288, S. 290, S. 982, & S. 1853 Hearing Before the Comm. on Indian Affairs*, 116th Cong. 20–28 (2019) (testimony of Michelle Demmert, Chief Justice of Central Council of Tlingit and Haida Indian Tribes of Alaska Supreme Court) [hereinafter Demmert statement] ("However, as written, the burden falls primarily on DOI to meet the requirements of the law and there is very little included to ensure that DOJ comes to the table as a full partner; as a matter of practice, it can be extremely difficult to require meaningful coordination and collaboration across Departments, and this must be a joint responsibility.").

<sup>138</sup> Malerba statement, *supra* note 116, at 37.

<sup>139</sup> S. 290, 116th Cong. (2019).

<sup>140</sup> S. 1853, 116th Cong. (2019).

seeks to amend VAWA 2013's SDVCJ, striking "domestic violence" and instead expanding SDVCJ to include "domestic, dating, or sexual violence, sex trafficking, or stalking."<sup>141</sup> Of these, the latter—called the Justice for Native Survivors of Sexual Violence Act ("Justice Act")—is the most interesting, and perhaps the most necessary.

As previously discussed, a major loophole in VAWA 2013 is the failure to address violence from strangers, as it focuses instead on intimate partner violence.<sup>142</sup> The Justice Act strikes directly at that loophole: it would expand tribal criminal jurisdiction to cover assault from a stranger, stalking, harassment, and other such crimes that SDVCJ fails to address.<sup>143</sup> Moreover, the ICRA currently defines both dating and domestic violence as just that: violence.<sup>144</sup> But the Justice Act proposes to expand that definition: both dating and domestic violence would not require violence, but rather would "include[] any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs."<sup>145</sup> This is crucial for autonomy: under the Justice Act, tribal law, rather than a non-tribal body, defines the reach of special tribal criminal jurisdiction. Defining the laws that govern a tribe's land goes straight to the core of autonomy. And if it passes, when a non-Indian violates tribal law in Indian country, SDVCJ applies—whether or not they act with violence.

Furthermore, the Act recognizes that words matter by proposing to rename SDVCJ. No longer reserved for domestic violence, the name would become Special Tribal Criminal Jurisdiction.<sup>146</sup> Though a seemingly small change, the new name carries heavy symbolic weight. While tribal authority would remain subject to the statutory sentencing limits, calling it *tribal* criminal jurisdiction reflects expanded autonomy. The jurisdiction could extend to sex trafficking, for example,<sup>147</sup> or to related conduct—that is, any other violation of tribal law that occurs in connection with a crime falling

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<sup>141</sup> S. 288, 116th Cong. § 2 (2019).

<sup>142</sup> BALL, *supra* note 58, at 181–82.

<sup>143</sup> S. 288, 116th Cong. § 2 (2019).

<sup>144</sup> 25 U.S.C. §§ 1304(a)(1), (2).

<sup>145</sup> S. 288, 116th Cong. § 2 (2019).

<sup>146</sup> *Id.* §§ 2(2)(D), (F).

<sup>147</sup> Sex trafficking was not defined in the ICRA, and the Justice Act proposes a broad definition covering "recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting by any means a person; or . . . benefiting, financially or by receiving anything of value, from participation" in any of the described acts. *Id.* § 2(7). This is not traditional violence and would not fall under SDVCJ. But protecting vulnerable members from something as egregious as sex trafficking is necessary to exercise any autonomy, and its exclusion from SDVCJ as it exists now is striking.

within Special Tribal Criminal Jurisdiction.<sup>148</sup> Even with the ICRA's sentencing limits at play, the ability to prosecute non-Indians arrested for additional forms of sexual violence is a step forward.

## II. REENVISIONING TRIBAL JURISDICTION IN THE SEXUAL VIOLENCE CONTEXT

With this backdrop of jurisdiction and legislation, this Comment turns now to where to go from here. This Part will evaluate the efficacy of the existing legislation, as well as the strength of currently pending legislation. A shortcoming of both the existing statutory framework and the pending legislation is that they focus too much on the terminal stage of day-to-day violence against women—the missing and murdered indigenous women crisis—and inadequately address the day-to-day violence itself. Exacerbating this shortcoming is the inability of tribes to exercise their own sovereign authority. In order to adequately address these flaws, Congress must first overrule *Oliphant*, then turn its attention to proper allocation of funding to tribal police and judicial authorities. As a final step, tribes must hold sovereign authority over their own land and in protection of their own citizens. But before turning to criticisms and proposals, this Part will contextualize sexual violence against Native American women and its effect on Indian communities.

### A. THE ROOTS & CONTINUATION OF SEXUAL VIOLENCE

In early America, rape was a tool of colonialism.<sup>149</sup> This colonial foundation is central to understanding the insidiousness of sexual violence against Indian women. Rather than an assertion of individual power or an isolated act of violence, rape of Indian women serves as “a continuation of the colonization process.”<sup>150</sup> Properly contextualizing the impact that sexual violence has had on Native American communities requires an examination of its history.

That examination reveals that Native communities handled violence against women in a radically different manner than European societies.<sup>151</sup> Women were autonomous, protected, and played a central role in Native American society.<sup>152</sup> Colonial explorers would subsequently weaponize rape

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<sup>148</sup> *Id.* An example could be drug trafficking occurring in connection with sex trafficking—the former does not fall within special tribal criminal jurisdiction, but if ancillary to sex trafficking, would fall within tribal jurisdiction.

<sup>149</sup> See *infra*, Part III.A.2.

<sup>150</sup> Deer, *supra* note 82, at 129.

<sup>151</sup> See *infra*, Part III.A.1–2.

<sup>152</sup> See *infra*, Part III.A.1.

in order to upend the role of Native women in both their own communities and in the newly created Euro-centric one.<sup>153</sup> As explained further below, that weaponization would remain, codified into statute, and undergird the devaluation of Indian women. A small extension of jurisdictional autonomy cannot undo this history.

### 1. Sexual Violence Before and During Colonialism

Unlike the European travelers who would eventually encounter Native Americans, Native peoples “actually allowed women to make autonomous sexual choices”—much to the surprise (and horror) of the early Europeans.<sup>154</sup> Obviously, there were numerous Native societies, and an exhaustive study is better suited for a book than this Comment. But the general tenor is clear, and it was one of striking female autonomy. In 1722, for example, “a Frenchman[] wrote that young Native girls ‘are the mistresses of their own bodies,’” and a Lakota woman wrote that “[a]mong the Lakota, the woman owned her body and all the rights that went with it.”<sup>155</sup> The Cherokee believed that “[t]he sovereignty of Indian Tribes is connected to the safety of Native women.”<sup>156</sup> And the Cheyenne taught that “[t]he Nation shall be strong so long as the hearts of the women are not on the ground.”<sup>157</sup>

Written records of Native treatment of sexual violence rely almost exclusively on European recordings of incidents, punishments, and general attitudes. This impacts any study in two ways. First, it omits Native voices from the telling of their history. With few written criminal codes and no volumes of case law outlining their treatment of offenders, we often must experience Native cultures through the eyes of strangers. This leads to the second way: we know that discussion of the progressive nature of tribal jurisprudence is not based on some idealized, “noble savage” stereotype of Native American societies. If these explorers could paint Native societies as savages, they would.

Some tribes, though, do have a traceable legal history. William Bartram, a scientist who traveled through Creek Nation territory in 1773—before any written Creek law—observed that he “never saw or heard of an instance of an Indian beating his wife or other female, or reproving them in anger or

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<sup>153</sup> See *infra*, notes 164–165 and accompanying discussion.

<sup>154</sup> Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 464 (2005).

<sup>155</sup> Deer, *supra* note 85, at 130.

<sup>156</sup> Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J. L. & GENDER 179, 188 (2018).

<sup>157</sup> *Id.* at 187.

harsh language.”<sup>158</sup> One of the Creek Nation’s first criminal codes, from 1824, specifically outlawed violence against women.<sup>159</sup> Notably, for any offense violating this particular statute, the victim determined the punishment: “what she say it be law.”<sup>160</sup>

Other punishments for transgressions are similarly eye-opening, and quite distinct from European societies. The Iroquois would not permit any man who had sexually assaulted a woman to ascend to a leadership position.<sup>161</sup> And not only could Native women make their own sexual choices, “[i]f [they] did report a rape, they were believed.”<sup>162</sup> Not only is this a striking difference from today’s America, it was markedly different from European societies, where women were treated as “subordinate, at best, or as chattel at worst.”<sup>163</sup> From this background a major distinction between Native societies and European ones begins to emerge, one that continues to undergird the crisis of sexual violence against Indian women: to Native Americans, sexual violence was an affront to the community as a whole and struck at the center of their society. To Europeans, it was effectively a property crime.

Thus it is plain why “[e]ven Europeans who wrote disparagingly about Native people noted that Native people abhorred sexual violence.”<sup>164</sup> One European fur-trader gave the following account of tribal jurisprudence around rape: “I have known more than onest thire Councils, order men to be putt to Death for Committing Rapes, wh[ich] is a Crime they Despise.”<sup>165</sup> Other 18th century observers noted that unlike other cultures, “Native men did not sexually violate prisoners of war.”<sup>166</sup> Far from being some idealized stereotype, the historical record shows that sexual violence in pre-colonial Native societies simply did not rise to the levels of European societies.<sup>167</sup>

Colonizers quickly confronted the central role women played in Native societies. While searching for new land and resources, they “encountered

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<sup>158</sup> Deer, *supra* note 85, at 139 n.161.

<sup>159</sup> *Id.* at 139.

<sup>160</sup> *Id.*

<sup>161</sup> Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N.D. L. REV. 1, 13 (2008) (quoting Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 1, at 7 (2008)).

<sup>162</sup> Deer, *supra* note 148, at 464.

<sup>163</sup> Halldin, *supra* note 161, at 13 (quoting Deer, *supra* note 159, at 7).

<sup>164</sup> Deer, *supra* note 85, at 130.

<sup>165</sup> JAMES AXTELL, *THE EUROPEAN AND THE INDIAN* 182 (1981).

<sup>166</sup> Deer, *supra* note 85, at 129.

<sup>167</sup> *Id.* at 129–30.

Native women who were central political actors in the nations that governed these resources.”<sup>168</sup> Given that these societies were often matrilineal, colonizers were forced to contend with women who were not only autonomous, but who “controlled and regulated the lands and resources that colonizers wanted.”<sup>169</sup> This also places the language of colonization, riddled as it is with innuendo, in a different light.<sup>170</sup>

## 2. The Enduring Legacy

Not only did colonizers hold women in lower esteem simply as a matter of policy, they took this to extremes with Native women—most likely as a method of control and subjugation. Early in colonial history, they often used rape as a tool for control of Native peoples.<sup>171</sup> Centuries later, in 1909, the consequences of that method of subjugation became clear. During a Congressional debate that year addressing how to punish sexual violence in Indian country, a Representative opined that “the morals of Indian women are not always as high as those of a white woman and consequently the punishment should be lighter against her.”<sup>172</sup> That is, Native women asked for it, and their rapists deserved a lesser punishment.

This belief was codified and remained so for decades. In *Gray v. United States*, several Indian men were arrested and prosecuted for raping a non-Indian woman.<sup>173</sup> The offenders were tried and convicted by a federal district court.<sup>174</sup> On appeal, the Indian defendants argued that the statute under which they were punished was unconstitutionally race-based: the statutory punishment for an Indian defendant who raped an Indian woman was “at the discretion of the court,” whereas an Indian who raped a non-Indian woman

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<sup>168</sup> CASSELMAN, *supra* note 88, at 58.

<sup>169</sup> *Id.*

<sup>170</sup> Deer, *supra* note 85, at 131 (“The language used to describe imperial conquest is often similar to the language used to describe sexual violence. The land itself was often referred to in feminine terms, often praised for its ‘fertility’ or ‘virginity.’ The Spanish explorers often wrote of having ‘intercourse’ with the land.”).

<sup>171</sup> *Id.* at 132 (“Sexual violence was often linked directly to some of the most destructive acts against Native peoples of the United States, such as forced removal and relocation in the Trail of Tears and the Long Walk. Native women were raped by white men during encounters such as the Gold Rush. These documented accounts reflect that sexual assault of Native women by non-Native men was not isolated to any particular geographic area, but was widespread, from the Northeast, to the Plains, to the Southwest. The Anglo-American legal system rarely, if ever, responded to these incidents. The widespread rape of Native women had numerous effects upon indigenous nations, including the spread of sexually-transmitted disease. The systemic culture of sexual violence also resulted in numerous cultural traumas.”).

<sup>172</sup> *Id.* at 125 (quoting Cong. Rec. 2596 (1909)).

<sup>173</sup> 394 F.2d 96, 97 (9th Cir. 1967).

<sup>174</sup> *Id.*

faced a statutory punishment of “death, or imprisonment for any term of years or for life.”<sup>175</sup> The Ninth Circuit deferred to the legislature:

“Congress has seen fit to diminish the penalty to be imposed upon an Indian who is convicted of rape upon another Indian in Indian Country, by enacting the specific provisions contained in 18 U.S.C. § 1153, which mitigate the penalty that otherwise would be imposed under 18 U.S.C., Section 2031 [if the victim was a non-Indian].”<sup>176</sup>

In a perverse distinction from the *Oliphant* jurisdictional gap, which bases jurisdiction on the suspect’s race, the very severity of the crime here was distinguished by the *victim’s* race. Native women were partway citizens, calling to mind how tribes must undergo federal supervision without full constitutional rights.<sup>177</sup>

Native American cynicism towards existing legislative solutions (primarily concurrent jurisdiction), then, comes from a lengthy history. Given the lack of protection Congress has provided, as described in *Gray* and later embodied in *Oliphant*, a feeling in Native communities that state and federal authorities serve to police rather than protect their communities is inevitable.<sup>178</sup> This feeling drives the necessity of tribal autonomy: centuries of wrongs are not undone by permitting certain complying tribes to exercise limited criminal jurisdiction over non-Indians;<sup>179</sup> rather, tribes must exercise that authority themselves. And, as explained below, recent attempts by Congress to address the consequence of these legislative and judicial failures—high rates of sexual violence against Native American women—continue to fall short.

## B. WHERE LEGISLATION FALLS SHORT

In looking at both recent and proposed legislation, three primary issues arise regarding Congress’s attempts to solve the epidemic of violence against Native American women. First, the legislation’s focus on missing and murdered indigenous women has failed to fully account for the day-to-day violence women on reservations face. Second, VAWA 2013’s focus on relationship-based violence fails to address the myriad scenarios in which a woman is assaulted by someone with whom she has no preexisting relationship. Third, the ICRA and TLOA’s limitations on criminal

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<sup>175</sup> *Id.* at 98.

<sup>176</sup> *Id.*

<sup>177</sup> *See infra*, Part III.C.3.

<sup>178</sup> Deer, *supra* note 85, at 126.

<sup>179</sup> *See supra*, Part II.B.

punishment split the baby, in that they subject tribes to traditional federal oversight—habeas corpus, constitutional protections for defendants, etc.—while refusing to extend the freedom to adjudicate to the tribes. The first two issues pull in different directions and exacerbate the third issue: a focus on missing and murdered women at the expense of day-to-day violence ignores a major root cause of the missing and murdered women crisis and distracts from non-relationship-based violence against women, and addressing root causes is difficult given the institutional limitations imposed by the ICRA and TLOA.

### 1. *Lack of Focus on Day-to-Day Violence Against Women*

Many of Congress's recent legislative attempts, such as Savanna's Act, focus on the missing and murdered indigenous women epidemic. In December 2018, Congress held a hearing on the crisis.<sup>180</sup> Alleviating this crisis is obviously important—Native American women constitute a disproportionate number of the missing person's list, and structural shortcomings put them in a uniquely vulnerable position relative to women of other races. But violence against Native American women manifests in many different ways, and focusing solely on missing and murdered indigenous women obscures the day-to-day violence that inflicts trauma on individuals and communities.<sup>181</sup>

Native American women are an outlier among racial groups. Unlike sexual crimes committed against other racial groups, the vast majority of sexual crimes with Native victims are interracial.<sup>182</sup> Unlike women of any other race, though, Native American victims face a complex jurisdictional web that turns not on the nature of the crime, but on the race of the perpetrator and the physical location of the crime. The lack of consequences for perpetrators can lead to cyclical violence that creates cynicism about the justice system's efficacy, paralyzes communities, and occasionally leads to families simply leaving the reservation.<sup>183</sup> The psychological toll this can

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<sup>180</sup> See generally *Missing and Murdered: Confronting the Silent Crisis in Indian Country: Hearing Before the Comm. on Indian Affairs*, 115th Cong. (2018).

<sup>181</sup> Though the focus of this Note is sexual violence, the day-to-day crimes afflicting Indian country take on other forms. As one example, "drug cartels deliberately base their operations in Indian Country because of the lack of law enforcement." 154 Cong. Rec. H8455-03 (statement of Rep. Sandlin); see also *America by the Numbers: Episode Four: Native American Boom Town* (PBS television broadcast 2014), <https://www.pbs.org/video/america-numbers-native-american-boomtown/> [<https://perma.cc/UZ9L-CC7Z>].

<sup>182</sup> DEER, *supra* note 9, at 6.

<sup>183</sup> See Suzianne D. Painter-Thorne, *Tangled up in Knots: How Continued Federal Jurisdiction Over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. REV. 239, 245–46 (2011).

have on a community is made plain by manifestations of trauma, such as the finding that “84% of Alaska Native women entering a residential substance abuse treatment facility had experienced rape.”<sup>184</sup>

The toll of the missing and murdered indigenous women crisis surely heightens this trauma. But focusing too much on missing women can result in ignoring a major underlying cause: the day-to-day violence and trauma women face. Lack of attention to this cause is exacerbated by the jurisdictional gaps and limited autonomy tribes can exercise. Instead, women must rely on state or federal officials to obtain justice—officials whom Native communities often see as policing their reservations while failing to protect their citizens.<sup>185</sup>

## 2. *SDVCJ's Shortcomings*

Of the three primary problems with the legislative solutions, the limited scope of SDVCJ is the one problem that Congress has explicitly attempted to address.<sup>186</sup> In the Justice Act, Congress seeks to expand VAWA 2013’s SDVCJ to all acts of sexual violence against women.<sup>187</sup> There is no condition that there be a preexisting relationship between the victim and the perpetrator, as there is in VAWA 2013.<sup>188</sup> If passed, the Act would also permit the limited exercise of tribal jurisdiction—allowing for punishments of up to three years for TLOA-compliant tribes or one year for non-compliant tribes—over non-members, Indian or not, who violate tribal law in their Indian country.<sup>189</sup> This would be a tremendous start. However, it still proposes a piecemeal solution to an endemic problem.

Presume a world in which the Justice Act passes in its present form. Tribes would enjoy this expanded jurisdiction and be able to take a step towards autonomy. They would not, however, be able to address many of the crimes that can lead to sexual violence—drug trafficking, drug use, or criminal alcohol use (like DUI) by non-Indians, for example—nor would

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<sup>184</sup> Deer, *supra* note 85, at 124.

<sup>185</sup> *Id.* at 126.

<sup>186</sup> See S. 288, 116th Cong. (2019).

<sup>187</sup> *Id.* As discussed in Part II.C.3, the special tribal criminal jurisdiction would cover assault from a stranger, stalking, harassment, and other such crimes that SDVCJ fails to address. See also Olson, *supra* note 108, at 838 (“The SDVCJ has been dubbed a ‘partial’ *Oliphant* fix, in that child abuse, elder abuse, and sexual assault by a stranger—unless either one of these crimes violates a preexisting restraining order—are not covered by the expanded criminal authority of the tribes.”).

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* at 834; see *supra* Sections II.A.4, II.B.1.

they be able to impose a sentence beyond nine years.<sup>190</sup> Further, their police and courts would likely see an increase in use, but without a corresponding increase in funding.<sup>191</sup> There is already a lack of law enforcement in Indian country: “[i]n [fiscal year] 2020, Indian Country only had 1.9 officers per 1,000 residents compared to an average of 3.5 officers per 1,000 residents nationwide.”<sup>192</sup> And population alone does not tell the whole story—rural reservations have a whole set of concerns not present in cities or suburbs. Fort Berthold, for example, has 7,300 residents living in a million-acre territory.<sup>193</sup> While a densely populated city may have three to five officers per 1,000 people,<sup>194</sup> residents in places like Fort Berthold have 1.9 officers per 1,000 people on top of a possible several-hour drive to respond to a call.

Even the Justice Act, therefore, would do little to permit true autonomy, instead reinforcing the reliance tribes have on state and federal authorities to assist in law enforcement.<sup>195</sup> Tribes often want to preserve traditional methods of adjudication, which many times differ from the adversarial model we employ in the American system.<sup>196</sup> Ideally, traditional tribal justice systems would be fully preserved. But given the social and geographic reality—dozens of reservations, where non-Indians regularly live and marry enrolled Indians—it is unclear how realistic a proposition that is.<sup>197</sup> But we can easily envision a world in which “tribes seek to take the best of the Western model while still focusing on tribal laws, traditions, and values.”<sup>198</sup> To develop such a jurisprudence, tribes must be free to do so, not meticulously monitored by federal authorities.

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<sup>190</sup> This is not to argue for overly harsh punishments, or to imply that tribes want to impose massive sentences. It is to say that tribes simply do not have the option to make that choice for themselves.

<sup>191</sup> See S. 288, 116th Cong. (2019).

<sup>192</sup> Malerba statement, *supra* note 119, at 4.

<sup>193</sup> MY TRIBAL AREA, U.S. CENSUS BUREAU (2020), <https://www.census.gov/tribal/?st=38&aianihh=1160> [<https://perma.cc/4EST-PNBC>]; *Fort Berthold Agency | Indian Affairs*, BIA.GOV, <https://www.bia.gov/regional-offices/great-plains/north-dakota/fort-berthold-agency> [<https://perma.cc/7H35-26Y3>] (last visited June 28, 2020).

<sup>194</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2016, TABLE 26 (2016). For example, in 2016, Washington, D.C. had 5.5 officers per 1000 citizens, Chicago 4.4, New York City 4.2, Detroit 3.5, and Beverly Hills 3.3. *Id.*

<sup>195</sup> See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1595 (2016) (“With increased authority comes greater federal interference and more oversight into internal tribal institutions and processes.”).

<sup>196</sup> See Joshua B. Gurney, *An “SDVCJ Fix”—Paths Forward in Tribal Domestic Violence Jurisdiction*, 70 HASTINGS L.J. 887, 910 (2019).

<sup>197</sup> See Riley, *supra* note 193, at 1622–24.

<sup>198</sup> *Id.* at 1628.

### 3. *Statutory Sentencing Limitations*

A third gap left from the active and proposed legislation is the ICRA's statutory limitations on tribal criminal punishment, which were expanded for participating tribes by the TLOA.<sup>199</sup> The statutory ceilings force American criminal systems onto tribes while failing to permit tribes the autonomy to operate within those systems as they see fit.<sup>200</sup> Again, this is not to make a normative argument that tribes should punish crimes more harshly; rather, it is to argue that they should have that choice. The statutory ceilings can be viewed as a compromise: giving tribes absolute independence may present federalism problems, whereas forcing absolute conformity to the American justice system calls to mind the wretched history between Native American tribes and the federal government. But that compromise does more harm than good. Statutory limitations infantilize tribes, prohibiting them from fully protecting their citizens, and only reinforce tribal reliance on state and federal officials.<sup>201</sup>

Under the ICRA, tribes are forced to punish rape (and any other crime) as no more than a misdemeanor, bolstering the view that tribes neither could nor would exert authority over felonies.<sup>202</sup> The TLOA has tripled the limitations for complying tribes, allowing three years per crime for up to three crimes—so sentence stacking could permit jailing a rapist for a maximum of nine years, depending on the number of offenses charged.<sup>203</sup> With the passage of the TLOA, tribes could finally choose to punish rapists as felons, something that “almost all sex crimes in American law are categorized as.”<sup>204</sup> This is slouching towards autonomy, but with strings attached: tribes must still to rely on state and federal prosecutors if they want to impose sentences above the statutory limits.<sup>205</sup> In other words, tribes are

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<sup>199</sup> See *supra* Part II.B.1.

<sup>200</sup> See DEER, *supra* note 9, at 39–41; see also Malerba statement, *supra* note 119, at 3.

<sup>201</sup> See Deer, *supra* note 85, at 126.

<sup>202</sup> DEER, *supra* note 9, at 40. This fear hearkens back well over a century. As discussed in Part II.A.1, Congress's fear in passing that Act was that tribes would refuse to punish crimes in a manner Congress deemed adequate. Now, the fear is that tribes cannot be trusted to punish above a certain amount. The concern is nominally different, but the paternalism is the same.

<sup>203</sup> *Id.* at 100–01.

<sup>204</sup> *Id.* at 40; see also Fortin, *supra* note 75, at 90 (“In 1968, the U.S. Congress essentially divested tribal courts of the right to hand down felony sentences.”). The dividing line between a felony and a misdemeanor is at one year: crimes “punishable by more than one year” are considered felonies. *Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>205</sup> A comparison of various states reveals a stark contrast between the nine-year maximum (three years per crime) that the ICRA allows and the maximum punishments that states allow. For example, in Oklahoma, first-degree rape is punishable by death or not less

allowed to be sovereign, but only in the manner that the federal government deems adequate.

This halfway solution also has downstream effects. Placing tribal criminal jurisdiction in such a liminal space has resulted in a jurisdiction “so functionally limited that tribes have not been incentivized to build up suitably professional and functional criminal justice institutions of their own.”<sup>206</sup> This could, for example, be a root cause of the TLOA’s seemingly obvious condition that a tribal judge must be an admitted attorney.<sup>207</sup> Because tribal justice was limited, and because some tribes had farmed out law enforcement, willingly or not, to state or federal officials, there was little incentive to invest resources into developing an autonomous justice system. That lack of an autonomous justice system could, in turn, serve as a justification down the road for withholding criminal jurisdiction from tribes.<sup>208</sup> And the cycle keeps spinning.

### C. A LOOK FORWARD: PROPOSED SOLUTIONS

There is no one-size-fits-all solution to the epidemic of sexual violence on reservations. However, there are three steps that will significantly help tribes exercise their autonomy and protect their most vulnerable members. First, Congress must overrule *Oliphant* to permit full criminal jurisdiction over non-Indians. Second, federal resource allocation must adequately support tribal police and courts. Lastly, jurisdictional schemes must reflect tribal autonomy—something that will be much easier to accomplish without *Oliphant* blocking the path forward.

#### 1. Overruling *Oliphant*

As long as *Oliphant* stands, any other attempted solution is stillborn. Overruling the decision is the most important step in beginning to address sexual violence on Indian reservations. Tribes simply cannot protect their members when their jurisdiction over non-Indians is statutorily limited to those with significant ties to the tribe.<sup>209</sup> The statistics about interracial rape

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than five years’ imprisonment. OKLA. STAT. ANN. tit. 21, § 1115 (West 2009). In South Dakota, rape through “force, coercion, or threats” receives fifty years’ imprisonment. S.D. CODIFIED LAWS §§ 22-22-1(2), 22-6-1(4) (2016). In Montana, sex without consent receives either life imprisonment, or confusingly, “imprisonment . . . for a term of not more than 20 years.” MONT. CODE ANN. § 45-5-503(2) (West 2019).

<sup>206</sup> David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism*, 91 OR. L. REV. 725, 762 (2013).

<sup>207</sup> See 25 U.S.C. § 1302(c)(3).

<sup>208</sup> See Fortin, *supra* note 75, at 104–06.

<sup>209</sup> See Riley, *supra* note 193, at 1605.

of Indian women and rising crime on certain reservations in the direct wake of oil booms are stark reminders that much of what plagues reservations today is crime and violence from outsiders,<sup>210</sup> yet *Oliphant* prevents the exercise of criminal jurisdiction over those outsiders.

Notably, both federal and tribal officials have decried *Oliphant*. An Assistant United States Attorney wrote that *Oliphant* “ha[s] a significant impact on day-to-day life in Indian country in that [it] affect[s] one of the most basic tenets of sovereignty: the ability of a government to exercise criminal jurisdiction within its own territory.”<sup>211</sup> And in recent hearings in front of the Senate Committee on Indian Affairs, the Chief of the Mohegan Tribe testified that recognition of sovereign rights and resolution of the violence against Native women crisis “cannot truly be accomplished without the full restoration of criminal jurisdiction to our governments through a fix to the Supreme Court decision in *Oliphant*.”<sup>212</sup>

Furthermore, *Oliphant* is the jurisdictional root of many of the problems facing law enforcement on reservations.<sup>213</sup> While it stands, there is a judge-made barrier to tribal autonomy. This barrier even prevents tribes from protecting their own members, the most basic function of a government. When tribes cannot perform that function, it delegitimizes them in the eyes of their members, exposes them to opportunistic criminals, and creates a cycle of crime and violence that further threatens their autonomy.

## 2. Adequate Allocation of Resources

Second, additional resources will improve tribal law enforcement’s efficacy. Tribal police departments are short-staffed, and tribal courts are backlogged due to prosecutorial shortages.<sup>214</sup> Missing and murdered indigenous women are not tracked due to insufficient databases and an inability to match tribal records with state and federal ones.<sup>215</sup> Because of the role that a perpetrator’s race plays in crimes in Indian country, tribal police

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<sup>210</sup> See, e.g., Lailani Upham, *Oil Booms, So Does Violence*, CHAR-KOOSTA NEWS (Dec. 20, 2018), [http://www.charkoosta.com/news/oil-booms-so-does-violence/article\\_0386cf00-0949-11e9-a5df-6ba0e817e8a3.html](http://www.charkoosta.com/news/oil-booms-so-does-violence/article_0386cf00-0949-11e9-a5df-6ba0e817e8a3.html) [<https://perma.cc/LR33-RJHG>].

<sup>211</sup> Christopher B. Chaney, *The Effect of the United States Supreme Court’s Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173, 174 (2000).

<sup>212</sup> Malerba statement, *supra* note 119, at 11–12.

<sup>213</sup> See BALL, *supra* note 58, at 193–202.

<sup>214</sup> See Malerba statement, *supra* note 119; *America by the Numbers: Episode Four: Native American Boomtown* (PBS television broadcast Oct. 24, 2014), <https://www.pbs.org/video/america-numbers-native-american-boomtown/> [<https://perma.cc/UZ9L-CC7Z>].

<sup>215</sup> See Demmert statement, *supra* note 136.

forces are often faced with the decision of whether to expend scarce resources to determine whether they can even investigate.<sup>216</sup>

Recall that Fort Berthold, a million-acre reservation, has a police force of twenty officers.<sup>217</sup> Fort Berthold is lucky in some senses—the reservation has a stream of income from the Bakken formation, and a built-in base of oilfield workers to patronize its casinos and businesses.<sup>218</sup> But not all reservations have these revenue streams. For example, Holy Cross, Alaska recently received a \$185,000 grant from the Department of Justice for the hiring and training of a tribal police officer—the community’s first formal law enforcement official since 2017.<sup>219</sup> It is easy to imagine the predicament tribal law enforcement officials face when deciding whether to expend meager resources on a case the tribe may not even have jurisdiction over.

The reasons this is a necessary solution are not merely financial—they are also moral. The takeover of vast swaths of land and natural resources by the United States has placed the federal government in a position of providing “unique legal and moral trust and treaty obligations to Tribal Nations and Native people.”<sup>220</sup> Moreover, through legislation like the ICRA and the TLOA, “the federal government is shifting authority through legislation to tribes without concomitantly shifting the resources to make those justice systems functional.”<sup>221</sup> That is, tribes are being set up to fail. Assignment of responsibility without assignment of the resources necessary to assume the responsibility is farcical.

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<sup>216</sup> See Malerba statement, *supra* note 119.

<sup>217</sup> Horwitz, *supra* note 22. In 2001, a Department of Justice study of policing on American Indian reservations found that “[t]he typical department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time (a level of police coverage that is much lower than in other urban and rural areas of the country).” DEP’T. OF JUST., POLICING ON AMERICAN INDIAN RESERVATIONS vi (2001), <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf> [<https://perma.cc/PA6P-M6VU>].

<sup>218</sup> There are allocation issues within the tribes on Fort Berthold resulting from the income stream, though. The tribal government purchased a million-dollar yacht for a riverboat casino, while its residents lacked running water and needed police protection. See, e.g., Horwitz, *supra* note 22; *America by the Numbers: Episode Four: Native American Boomtown* (PBS television broadcast Oct. 24, 2014), <https://www.pbs.org/video/america-numbers-native-american-boomtown/> [<https://perma.cc/UZ9L-CC7Z>].

<sup>219</sup> Emily Hofstaedter, *Despite Federal Funding, Holy Cross Remains Without Tribal Police Officer*, KNOM RADIO MISSION (Nov. 17, 2019), <https://www.knom.org/wp/blog/2019/11/17/despite-federal-funding-holy-cross-remains-without-tribal-police-officer/> [<https://perma.cc/R8LP-3QBM>] (“In July, Holy Cross received \$185,000 to hire and train a tribal police officer (TPO). The community hasn’t had any formal law enforcement since late 2017.”).

<sup>220</sup> See Malerba statement, *supra* note 119, at 4.

<sup>221</sup> Riley, *supra* note 193, at 1630.

### 3. Tribal Autonomy

Even with *Oliphant* overruled and tribal police properly funded and supported by Bureau of Indian Affairs officials, easing the day-to-day trauma requires simplifying the jurisdictional kaleidoscope. As discussed above, there is an intricate jurisdictional investigation that must be performed before an investigation of the actual crime even begins.<sup>222</sup> The necessity of determining whether a crime took place on a reservation or off, in combination with the ICRA's statutory sentencing limits, can lead to several consequences. Two primary ones are tribes resigning themselves to inadequate punishment for people who have committed crimes on their reservations and against their people,<sup>223</sup> and cross-deputization agreements with local or federal officials, which permit "one entity's law enforcement officers to issue citations, make custodial arrests, and otherwise act as enforcement officers in the territory of another entity."<sup>224</sup>

Sovereignty requires that tribes have the ability to enforce laws as they see fit.<sup>225</sup> Half-measures, such as requiring constitutional protections for tribal criminal defendants while statutorily capping tribal authority to punish those same defendants,<sup>226</sup> serve neither the interest of the tribes nor the interest of federal and state governments. Tribes inevitably feel as though they are subject to a "second-class system of justice."<sup>227</sup> The state government can simply back out of a cross-deputization agreement with the election of a new local sheriff<sup>228</sup>—calling to mind a long history of broken agreements and lowering the incentive for tribes to enter into such

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<sup>222</sup> See Malerba statement, *supra* note 119.

<sup>223</sup> See *id.*

<sup>224</sup> Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65, 67 (2019). "[T]ribes are not always able to secure agreements with every neighboring state agency. Tribes and states face many barriers when negotiating cross-deputization agreements, including whether they have the power to negotiate such agreements, as well as the liability of officers and the local politics involved in negotiations between elected representatives." *Id.* at 85–86. But a cross-deputization agreement is not, in itself, necessarily a bad thing, provided tribes enter into them of their own volition with full autonomy. See Brief of Tom Cole et al. as Amicus Curiae in Support of the Petitioner at 4, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526) ("For more than two decades, the [Chickasaw and Choctaw] Nations' sovereign authority within their Reservations and commitment to the cooperative exercise of that authority have provided the framework for the negotiation of agreements that provide legal certainty, economic stability, and a better quality of life for all Oklahomans."). Ultimately, the process is more important than the end result.

<sup>225</sup> See Malerba statement, *supra* note 119.

<sup>226</sup> See 25 U.S.C. § 1302(c).

<sup>227</sup> Morrow, *supra* note 222, at 94.

<sup>228</sup> *Id.* at 92–93.

agreements in the first place. In order to have a legitimate solution, tribes must have both autonomy and the confidence that a single vote ousting a local sheriff cannot upend the law enforcement regime on which they rely.

Tribes must have authority to protect their own citizens and operate their own governments. If federal limitations are placed on their authority, such as constitutional protections for defendants and habeas review, those limitations should have the same effect on tribal courts as they have on state courts—operating to keep them within bounds, while still permitting sovereignty. In exchange for providing constitutional safeguards in tribal courts, tribes should have the power to prosecute people, regardless of race, who commit crimes against their members on their land—much the same way an Illinois citizen who commits a crime in Indiana can be prosecuted in an Indiana court that provides constitutional safeguards and habeas review. Without this, tribal authority is impotent.<sup>229</sup>

#### CONCLUSION

The restrictions on Native American criminal jurisdiction serve to constrain the autonomy and self-determination of Indians. But more pointedly, they prevent tribes from protecting their members—particularly female ones—from sexual violence. The story here is one of gaps: gaps in jurisdiction, in trust, and in autonomy. All of these add up to the constant drone of violence against women, and to its most visible result, the missing and murdered indigenous women crisis.

The latter crisis is the focus of much of the public's attention. While it certainly requires attention and a solution, focusing exclusively on missing and murdered women does little for those facing day-to-day violence exacerbated by these gaps. Diane Millich was neither missing nor murdered, and Savanna's Act would not have stopped her husband from assaulting her. Day-to-day violence impacts general spirit, inflicts trauma on thousands of women and children, and occurs at a much higher rate on reservations than it does outside Indian country.<sup>230</sup>

The holes left by the TLOA and VAWA's 2013 reauthorization are not properly addressed by pending litigation. Instead of patching Acts that fail to address the issue, Congress should instead point its energy towards overturning *Oliphant*, properly funding tribal law enforcement, and permitting tribal autonomy by allowing their courts to operate as any others would. Absent these fixes, Congress's attempts to resolve the plague of sexual violence in Indian country are bound to be inadequate.

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<sup>229</sup> See, e.g., BALL, *supra* note 58, at 192–93.

<sup>230</sup> See Deer, *supra* note 152, at 455, 465.