Tribal Law and Order Act of 2010: Breathing Life into the Miner’s Canary

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INTRODUCTION

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.¹

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John Echohawk, a Pawnee Indian and the current executive director of the Native American Rights Fund, recently told *Indian Country Today* that he advises Native litigants to avoid taking their cases to the United States Supreme Court “because the high court ‘will reinterpret treaties and Indian law against [Indians],’ and some of the justices are ‘outright hostile.’”

One might therefore think the canary is dead. However, the United States Congress recently passed into law the Tribal Law and Order Act of 2010 (“TLOA”), intended to assist Native American tribes in addressing lawlessness in Indian Country. The Act lends legitimacy to tribes’ visions of their justice systems and is a potential step toward true tribal self-determination.

While some have hailed the TLOA as “landmark legislation,” others call it “feel-good legislation.” Neither characterization, of course, is entirely accurate. In short, although the TLOA makes some meaningful changes, it is primarily a short-term fix. In many places it does not go far enough and some of the most important provisions of the Act may face difficulties in implementation.

At the one-year anniversary of the TLOA being signed into law, President Barack Obama promised to “continue to strengthen and fortify our government-to-government relationship with Indian Country.” If that is the direction of U.S. Indian Policy, and if the TLOA is the first in a series of congressional and executive actions aimed at fighting crime and promoting economic development in Indian Country, the TLOA may prove to be a landmark achievement. If the tide of American politics flows in a different direction, however, the TLOA may be largely forgotten.

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4. Statement on the First Anniversary of the Tribal Law and Order Act of 2010, 2011 DAILY COMP. PRES. DOC. 1 (July 29, 2011) (“American Indians and Alaska Natives have long been victimized by violent crime at far higher rates than the rest of the country, and the Tribal Law and Order Act is already helping us better address the unique public safety challenges that confront tribal communities.”).


The crime problem in Indian Country is unlikely to be solved by a grand fix from the federal government.\textsuperscript{10} Thus, although the TLOA provides some tools to tribal governments\textsuperscript{11} working to protect the safety and wellbeing of their members, true solutions must come from the political will and action of tribes, individual Native Americans, and their allies. Together these groups must work to reassert and responsibly exercise tribal sovereignty to address the issues of crime and crime prevention, reservation-by-reservation and tribe-by-tribe.

In Part I, this paper will examine the history of criminal jurisdiction in Indian Country. Part II will discuss the provisions of the TLOA, including its shortcomings and concerns with its implementation. In Part III, this paper will describe one tribe’s vision to improve criminal enforcement in Indian Country and its efforts to protect and encourage the exercise of tribal sovereignty.

I. THE HISTORY OF CRIMINAL JURISDICTION IN INDIAN COUNTRY

In order to understand the significance of the TLOA, one must understand the context in which it was enacted. This historical primer will describe the modern state of criminal jurisdiction in Indian Country and its historical underpinnings.

A. Crow Dog and the Major Crimes Act

On December 29, 1890, at the Lakota Pine Ridge Reservation, the American Seventh Calvary fired upon hundreds of Lakota Ghost Dancers.\textsuperscript{12} As many as 300 people, mostly women and children, were killed in what is known as the Massacre at Wounded Knee.\textsuperscript{13} Although there were some armed conflicts between Indians and U.S. forces afterward, historians often mark the Massacre at Wounded Knee as the end of the Indian Wars in the United States.\textsuperscript{14}

\begin{footnotes}
\item[10] Interview with Joe Martin, supra note 7 (“The government can’t fix this. The tribes have got to get serious about this stuff.”).
\item[13] Id.
\item[14] Bethany R. Berger, Red: Racism and the American Indian, 56 UCLA L. REV. 591, 628
\end{footnotes}
In reality, however, the Indian Wars took place beyond the battlefield—occurring also in the courts and legislatures. Although the full breadth of assimilation efforts intended to eradicate Native American culture is beyond the scope of this paper, it is important to note that the struggles over criminal jurisdiction in Indian Country have been one prong of that endeavor. Indeed, the consequence of many developments in federal Indian law, even those intended to help Indians, has been to water down Native cultural practices and diminish tribal sovereignty.

For example, on August 5, 1881, a Lakota sub-chief named Crow Dog shot and killed another Lakota chief, Spotted Tail. To resolve the conflict, “Lakota law directed the families of perpetrator and victim to meet together with peacemakers to decide on an exchange of property or services sufficient to make peace.” In accordance with tribal practice, Crow Dog paid $600, eight horses, and one blanket to the family of Spotted Tail, which “swiftly and effectively redressed the killing and returned the community to a peaceful state.” Yet this settlement was “seen as inappropriate and not fitting with the ‘civilizing’ plan by many . . . whites.” Consequently, federal officials arrested Crow Dog, who was tried and convicted of murder in a federal proceeding.

At the time, federal jurisdiction in Indian Country derived from the General Crimes Act and the Assimilative Crimes Act. The General Crimes Act extends federal criminal law into Indian Country and allows the federal government to prosecute all crimes in Indian Country by and against Indians. The Assimilative Crimes Act provides that where federal law does not proscribe an act, an offender (2009); see also Tom Streissguth, Wounded Knee 1890: The End of the Plains Indian Wars, at iv (1998).

15. Echo-Hawk, supra note 1, at 4 (describing an Indian in the American courts as one in the “Courts of the Conqueror”). Extending the martial metaphor, Echo-Hawk says: Only rarely in US history has the law served as a shield to protect Native Americans from abuse and to further their aspirations as indigenous people. The law has more often been used as a sword to harm Native peoples by stripping away their human rights, appropriating their property, stamping out their cultures, and, finally, to provide a legal justification for federal policies that have, at times, resorted to genocide and ethnocide. Id.


19. Goldberg, supra note 17


may be prosecuted in federal court under the law of the state or territory in which the act occurred.23 Both pieces of legislation still provide part of the basis for federal jurisdiction in Indian Country.24 In combination, the laws give the federal government jurisdiction over any crimes in Indian Country, subject to three exceptions set forth in the General Crimes Act: (1) where one Indian has “committed a crime against another Indian”; (2) where an Indian “has already been punished” by tribal law; and (3) where a treaty reserves criminal jurisdiction to an Indian tribe.25

Crow Dog filed a writ of habeas corpus and the U.S. Supreme Court heard his case in November of 1883.26 In particular, Crow Dog contended that the government had no jurisdiction over him because his crime fell within the exceptions set forth in the General Crimes Act.27 The government argued that the Act’s exceptions had been repealed by treaty and were not applicable to Crow Dog’s detainment.28 Construing the Act and the relevant treaties, the Court issued a unanimous opinion rejecting the government’s argument and held that the tribe had sole jurisdiction over Indian-on-Indian crime that occurred on the reservation.29 The Court issued a writ of habeas corpus freeing Crow Dog.30

This decision was wildly unpopular with the general public,31 prompting Congress to pass the Major Crimes Act in 1885.32 The Act originally provided federal jurisdiction over seven enumerated offenses committed by Indians.33 Further, it failed to recognize the three jurisdictional exceptions found in the General Crimes Act, thus extending federal jurisdiction to almost any criminal act in Indian Country.34 The Supreme Court has specifically left open the question of whether the Major Crimes Act divests tribes of their jurisdiction over the enumerated offenses, or whether Indian tribes and the federal government share concurrent jurisdiction.35

23. Id. § 13.
24. See id. §§ 13, 1152.
27. Id. at 558.
28. Id. at 562.
31. See Getches et al., supra note 1, at 157 (arguing that the BIA used the Crow Dog decision to foment public opinion in a long-term campaign to extend “white man’s criminal law over the reservation”).
33. Id. The Act now provides federal jurisdiction for fifteen offenses committed by Indians against Indians or non-Indians. 18 U.S.C. § 1153.
34. See Major Crimes Act § 9, 23 Stat. at 385.
35. United States v. John, 437 U.S. 634, 651 n.21 (1978) (“We do not consider here the
Multiple lower courts have upheld Indian tribes’ concurrent jurisdiction over the enumerated crimes.  

B. The Indian New Deal

Federal Indian policy of the intervening years was largely based on the 1887 General Allotment Act. Allotment policy hoped to assimilate Indians as productive agrarian citizens by giving tribal land to individual Indians and incentivizing farming. By 1934, however, over sixty percent of the land held by tribes in 1887 had passed into non-Indian hands.  

In response to this failed allotment policy, Congress passed the Indian Reorganization Act in 1934 (“IRA”), which was intended to strengthen tribal self-governance. In addition to ending allotment policy, the IRA authorized tribes to organize under constitutions and bylaws subject to approval by the Secretary of the Interior. Only recently have tribes begun to draft constitutions doing away with the need for approval from any outside sovereign.  

The tribal constitutions adopted under the IRA often followed the federal structure—that is, they included an executive branch, a legislature, and a judiciary—

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41. GETCHES ET AL., supra note 1, at 188.

42. CANBY, supra note 29, at 25-26.

although often with weak separation of powers. This can be attributed in part to suggestions from the Bureau of Indian Affairs (“BIA”), but also to Indian tribes’ “shaky recollection[s] of their traditional systems” and familiarity with BIA regulations and procedures. As a result, the tribal justice systems established under the IRA were not a reassertion of tribal tradition, but were more similar to their American judicial counterparts. These three-branch governments and BIA-style judiciaries were often out of step with the needs and realities of tribal life.

C. Termination and P.L. 280

In 1953, Congress officially adopted a policy of termination with regard to Indian tribes. Specifically, Congress intended to,

as rapidly as possible . . . make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .

One aspect of this termination policy was Public Law 280 (“P.L. 280”), which authorized the transfer of criminal jurisdiction in Indian Country from the federal government to state governments. Congress’s intention in passing this legislation
was to improve conditions and prevent crime in Indian Country. The consensus was that federal Indian law created a gap in the states’ enforcement authority and that states could do a better job if they had criminal jurisdiction throughout their territories.

The transfer of jurisdiction under P.L. 280 was initially mandatory in only five states, but allowed other states to opt in without tribal consent. Prior to 1953, the federal government and the tribes had concurrent jurisdictional authority in Indian Country. When the federal government granted its jurisdictional powers over Indians to the states, it could only grant the jurisdiction it had. Thus, P.L. 280 did not alter the tribes’ inherent jurisdiction.

Nevertheless, P.L. 280 had a tremendous practical effect on Indian tribes and their exercise of jurisdictional power. Prior to P.L. 280, contributions by the federal government to tribes had been “neither well-financed nor vigorous,” and “tribal courts often lacked the resources” for effective self-policing. Following the
enactment of P.L. 280, the federal government no longer provided funds for law enforcement and judicial services on P.L. 280 reservations. Instead, states were responsible for reservation law enforcement. Despite the tribes’ latent concurrent jurisdiction, as a practical matter, only the state provided any law enforcement or judicial services on most reservations.\textsuperscript{56} Thus, although P.L. 280 was intended to improve law enforcement in Indian Country, it did little to improve reservation conditions, in part, because it was an unfunded mandate.\textsuperscript{57}

D. Indian Civil Rights Act of 1968

The termination policies were widely considered a failure.\textsuperscript{58} Therefore, during the height of the Civil Rights movement, Congress passed the Indian Civil Rights Act (\textquotedblleft ICRA\textquotedblright ).\textsuperscript{59} In addition to preventing states from further asserting P.L. 280 jurisdiction without tribal permission, ICRA allowed states to retrocede P.L. 280 jurisdiction back to the federal government.\textsuperscript{60} Few states have done so; as a result, most tribes who were affected by P.L. 280 in 1968 remain under state jurisdiction today.\textsuperscript{61}

Although the Bill of Rights had previously not applied to Indian tribes,\textsuperscript{62} one effect of ICRA was to impose civil rights similar to the Bill of Rights on tribal governments.\textsuperscript{63} Some aspects of the Bill of Rights antithetical to tribal life were omitted, (for example, the First Amendment Establishment Clause and the Fifteenth Amendment requirement of voting rights regardless of race or color).\textsuperscript{64} Nevertheless,
ICRA was controversial among Indian tribes. Many viewed it as an imposition of dominant cultural values on Indian tribes by the federal government.\textsuperscript{65}

Courts have determined that the rights imposed on tribes for Indians under ICRA are similar, but not identical, to those afforded non-Indians.\textsuperscript{66} In 1978, for instance, the U.S. Supreme Court limited the right to federal habeas corpus review under ICRA to cases challenging the legality of detention.\textsuperscript{67} Another important difference is the right to an attorney. State and federal courts are required to provide counsel to indigent clients.\textsuperscript{68} However, ICRA only requires that defendants in Indian Country be afforded the right to an attorney “at his own expense.”\textsuperscript{69} This is largely attributable to the lack of attorneys in Indian Country, the lack of Indian bar associations to compel attorneys to take such cases, and a fear that tribes do not have the financial capability to assume the burden of providing counsel to indigent defendants.\textsuperscript{70} As a result, although confessions taken without an attorney present are inadmissible in state and federal courts,\textsuperscript{71} these confessions can be admissible in tribal courts.\textsuperscript{72}

Finally, ICRA limits tribal sentencing to one-year imprisonment or $5000 in fines, or both.\textsuperscript{73} This effectively stripped the tribes of any jurisdiction over felonies, limiting them to prosecuting misdemeanors. As a result, ICRA firmly cemented the primacy of off-reservation authorities in Indian Country law enforcement.

E. Oliphant and Duro

A final piece of the Indian Country jurisdictional puzzle consists of two controversial cases and a legislative “fix.” In \textit{Oliphant v. Suquamish Indian Tribe}, the Supreme Court ruled that tribes have no inherent criminal jurisdiction over non-Indians.\textsuperscript{74} Congress may confer such jurisdiction upon a tribe or tribes,\textsuperscript{75} although it

\begin{itemize}
  \item \textsuperscript{65} See CANBY, supra note 29, at 30-31.
  \item \textsuperscript{66} \textit{E.g.}, Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988); Wounded Head v. Tribal Council, 507 F.2d 1079, 1082-83 (8th Cir. 1975).
  \item \textsuperscript{67} Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
  \item \textsuperscript{68} Argersinger v. Hamlin, 407 U.S. 25 (1972).
  \item \textsuperscript{69} 25 U.S.C. § 1302(a)(6) (Supp. IV 2010).
  \item \textsuperscript{70} See Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong. 21 (1965) (statement of Frank J. Barry, Solicitor, U.S. Dep’t of the Interior); \textit{id.} at 340-41 (statement of Tribal Council, Mescalero Apache Tribe); \textit{see also} Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976).
  \item \textsuperscript{71} See Massiah v. United States, 377 U.S. 201, 204, 206 (1964).
  \item \textsuperscript{72} United States v. Doherty, 126 F.3d 769, 777-79, 781 (6th Cir. 1997), \textit{abrogated on other grounds by} Texas v. Cobb, 532 U.S. 162 (2001).
  \item \textsuperscript{73} 25 U.S.C. § 1302(a)(7)(B).
  \item \textsuperscript{74} 435 U.S. 191, 195 (1978).
\end{itemize}
has not yet done so. Many consider the *Oliphant* holding one of the biggest obstacles to law enforcement in Indian Country today.\(^{76}\) The Supreme Court went even further in *Duro v. Reina*, holding that tribes do not have criminal jurisdiction over nonmember Indians.\(^{77}\) Within a year of the Court’s decision in *Duro*, Congress amended ICRA to extend tribal jurisdiction over all Indians, regardless of membership.\(^{78}\) This legislation is commonly known as the “*Duro Fix.*”\(^{79}\)

As a result of *Oliphant*, *Duro*, and the *Duro Fix*, a non-Indian living on tribal reservation is immune from tribal criminal prosecution, but a Pawnee from Oklahoma visiting the Saint Regis Mohawk Reservation in New York is subject to the New York tribe’s jurisdiction. This leads one to question why Congress was so quick to fix the jurisdictional hole created by *Duro*, yet *Oliphant* is still the law of the land over thirty years later.\(^{80}\) Why, in other words, is a citizen of another Indian nation more subject to jurisdiction than a non-Indian who has chosen to marry a member and live on the reservation?

II. TRIBAL LAW AND ORDER ACT OF 2010

Federal Indian policy has left Indian Country a mish-mash of jurisdiction. Determining whether state, federal, or tribal jurisdiction applies in Indian Country requires evaluating the following questions: (1) Is the tribe subject to P.L. 280? (2) If so, is it “mandatory” or “optional” P.L. 280 jurisdiction?\(^{81}\) (3) Is the crime enumerated in the Major Crimes Act? (4) Is the accused Indian or non-Indian? (5) Is it a victimless crime? (6) If there is a victim, is the victim Indian or non-Indian?\(^{82}\)

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80. Lara, 541 U.S. at 205 (specifically addressing Congress’s ability to legislatively overturn *Oliphant*, saying the case “did not set forth constitutional limits that prohibit Congress from . . . taking actions that modify or adjust the tribes’ [retained sovereign] status”).
Depending on the answers to these questions, it is possible that one, two, or all three sovereigns have jurisdiction over the offense.

Unfortunately, this confusing and overlapping jurisdictional scheme has allowed crime to flourish in Indian Country. There are 101 victims of violent crime for every 1000 Indians—a rate nearly two and one-half times the national average. This means that although Indians make up only 0.5% of the population, “they make up 1.3% of all victims of violence in the United States.”

The Tribal Law and Order Act, signed into law by President Barack Obama on July 29, 2010, is an attempt by the federal government to address some of the problems facing law enforcement in Indian Country. While the ultimate success of the TLOA is undetermined, it is clear that the Act will face significant hurdles in implementation in Indian Country and is far from a comprehensive fix. In short, the Act may provide some short-term relief, but many of the long-term and systemic obstacles in Indian Country remain problematic. The following section will outline and critique the major provisions of the TLOA in relation to each of the following areas: (A) Federal Law Enforcement and Prosecution, (B) Tribal Law Enforcement, (C) Tribal Courts, (D) Crime Prevention, and (E) the TLOA on P.L. 280 Reservations.

A. Federal Law Enforcement and Prosecution

The TLOA intends to improve government-to-government relations between the United States and tribal governments in several ways. First, the TLOA created an Office of Tribal Justice, as well as a Native American Issues Coordinator, within the U.S. Department of Justice (“DOJ”) to serve as the primary point of contact for tribes and to coordinate the various DOJ activities in Indian Country. The Act also improves transparency in BIA spending, and requires greater consultation with tribal communities regarding public safety and justice.

The federal government has exclusive jurisdiction over crimes committed by non-Indians on non-P.L. 280 reservations. Thus, a major concern among Indian nations is that between 2000 and 2009, the federal government declined to prosecute 83. Matthew Handler, Note, Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It, 75 BROOK. L. REV. 261, 263 (2009).

84. Id.


88. Id. § 211(b), 124 Stat. at 2264-66 (codified at 25 U.S.C. § 2802 (Supp. IV 2010)).

one-half of all Indian Country crimes referred to it. This included declining sixty-seven percent of sexually related crimes referred in that time period. Making matters worse, decisions to decline to prosecute, or even to “undercharge,” are unreviewable.

Federal prosecutors’ decisions to decline cases are guided by both the United States Attorney’s Manual and local office guidelines. Offices that prosecute crimes in Indian Country often have specific, nonbinding guidelines for the offenses enumerated in the Major Crimes Act. Nevertheless, a prosecutor is called upon to make extremely “independent and highly subjective judgment[s] about the sufficiency of evidence to bring a case.” For example, the prosecutor must assess whether every fact necessary for the charge can be proven beyond a reasonable doubt. Since the cases are tried in federal courthouses, often located hundreds of miles from Indian Country with mostly non-Indian juries, the cultural context of the crime must be translated and the credibility of witnesses to those in the dominant culture must be assessed.

Furthermore, as outsiders to the community, federal prosecutors have various difficulties prosecuting crimes in Indian Country that may discourage them from prosecuting cases they might pursue outside of Indian Country. The crime scene, the victim, and the witnesses are often hundreds of miles from the prosecutor. As an outsider, the prosecutor may have difficulty getting witnesses to come forward or to be forthright if they do. The prosecutor rarely has a sense of the tribal values, history, or language in which the crime occurred. Thus the decision not to

91. Id.
94. Washburn, supra note 92.
95. Id.
96. Id. at 727.
97. Id. at 741-64 (discussing at length the constitutional and social problems caused by jury selection in federal Indian trials involving major crimes).
98. Handler, supra note 83, at 287.
99. Id. at 286.
100. See id. at 286-87.
prosecute often does not align with the interests of a particular community or the tribe in any particular case.\footnote{101. See Washburn, supra note 92, at 729-30.}

In an effort to create accountability for prosecutors, the TLOA requires that upon declining a case, federal prosecutors must provide a report detailing the reasons for their decision and the prosecutor must coordinate and share any evidence with tribal agencies seeking a conviction in tribal courts.\footnote{102. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, sec. 212, § 10(a)(1), (3), 124 Stat. 2261, 2267 (codified at 25 U.S.C. § 2809(a)(1), (3) (Supp. IV 2010)).} The TLOA also mandates the annual collection of declination data in order to better assess future issues.\footnote{103. Id. sec. 212, § 10(a)(4), 124 Stat. at 2267-68 (codified at 25 U.S.C. § 2809(a)(4)).}

In order to facilitate more crime prosecution in federal courts, the Act authorizes deputization of Special Assistant U.S. Attorneys\footnote{104. Id. § 213(a)(1)(A), 124 Stat. at 2268 (codified at 28 U.S.C. § 543(a) (Supp. IV 2010)).} and U.S. Attorney Tribal Liaisons\footnote{105. Tribal Law and Order Act of 2010 sec. 213(b)(1), § 13(a), 124 Stat. at 2268 (codified at 25 U.S.C. § 2810(a) (Supp. IV 2010)).} to prosecute reservation crimes in federal courts. The White Earth Nation in Minnesota envisions this provision being exercised to deputize tribal attorneys.\footnote{106. Interview with Jim Schlender, Jr., supra note 5.} In other words, it could empower tribal attorneys to act as federal prosecutors enforcing federal law with federal jurisdiction over non-Indians on the reservation. It would be up to the \textit{tribal} prosecutor to exercise the discretion afforded the federal prosecutor, thereby serving as a partial fix to \textit{Oliphant}.\footnote{107. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).} Allowing tribal prosecutors to participate in the prosecutorial decisions of federal attorneys would mean that such discretion is more likely to be exercised within the values of the tribal community.

In addition, the TLOA encourages federal courts to hold trials and other proceedings in Indian Country.\footnote{108. Tribal Law and Order Act of 2010 sec. 213(b)(1), § 13(d)(1)(B), 124 Stat. at 2269 (codified at 25 U.S.C. § 2810(d)(1)(B)).} If tribal attorneys deputized as Special Assistant U.S. Attorneys conduct such cases, tribes will be afforded a new and powerful tool for law enforcement on the reservation. This will also encourage community
involvement in the criminal justice process by allowing local Indians public access to the criminal justice process.109

Although the TLOA mandates federal prosecutors to help tribal courts obtain convictions when declining federal jurisdiction, Indian tribes are extremely limited in the sentences they can impose.110 Further, in weighing whether to decline a case, U.S. Attorneys are admonished that “[t]he ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted.”112 Thus, the large number of declinations by federal prosecutors is troubling given the lack of available alternatives for Indian tribes.

B. Tribal Law Enforcement

In addition to problems of prosecution, the Indian law jurisdictional patchwork creates tremendous problems for law enforcement. Federal law enforcement in Indian Country is handled by the BIA and the Federal Bureau of Investigation (“FBI”).113 The BIA generally handles misdemeanors and the FBI handles felonies and “Major Crimes.”114 On P.L. 280 reservations, the state handles felony and misdemeanor investigations.115 In addition, many tribes have their own police forces, often funded with federal money.116

Indian Country law enforcement is not a good fit with FBI culture or training. For example, the crimes within Indian Country, while “major” within Indian communities, are generally routine “street crimes” for FBI agents.117 The FBI specializes in proactive long-term investigations of complex criminal enterprises, such as terrorist plots, organized crime, and drug cartels.118 Indian Country investigations, by contrast, are most often “reactive,” meaning that the investigation takes place after the crime has occurred.119 As a result, Indian Country work is

109. See Washburn, supra note 92, at 757-62; see also id. at 762 (“[F]ederal courts have erred in construing the relevant community as the entire judicial district, rather than considering which community the law seeks to protect.”).
110. See id. at 769 (arguing for “public trial as a criminal procedural safeguard” that can “ensure the integrity and quality of the testimony offered at trial” and can “encourage witnesses to perform their duties more conscientiously” (internal quotation omitted)).
112. EXEC. OFFICE FOR U.S. ATT’YS, supra note 93, § 9-27.240(B)(3).
113. See Handler, supra note 83, at 281-82.
114. See Washburn, supra note 92, at 718-20.
115. See Goldberg, supra note 55, at 537-38.
117. See Washburn, supra note 92, at 718.
118. Id.
119. Id.
relatively low in prestige and low in priority for the FBI, and “the individual FBI agent may find such work lonely, dull, or, given the subject matter, even unpleasant.”\textsuperscript{120} In short, it is commonly a rookie job and agent turnover is high.\textsuperscript{121}

The BIA, unlike the FBI, contracts with tribes under the Indian Self-Determination and Education Assistance Act to provide law enforcement responsibilities.\textsuperscript{122} The most common form of police presence within Indian Country is tribal police force under a “638 contract.”\textsuperscript{123} Under the 638 contract arrangement, tribes contract with the BIA using federal funding and establish tribal police departments administered by the tribes.\textsuperscript{124} These departments maintain the “organizational framework and performance standards” of the Bureau’s Division of Law Enforcement Services.\textsuperscript{125} Amendments to the Indian Self-Determination and Education Assistance Act now provide for “self-governance compacts,” which are similar to 638 contracts, but allow the tribes even more control.\textsuperscript{126} Under these arrangements, the tribe essentially substitutes its own law enforcement agency for the BIA.\textsuperscript{127} This has the added advantage of giving tribes police power over non-Indians because they are acting in place of a federal agency.\textsuperscript{128}

The best law enforcement for many reservation crimes is the tribal police department. However, in addition to lacking full jurisdiction, police forces in Indian territories are tremendously overworked and underfunded.\textsuperscript{129} A 2001 DOJ study notes that a typical tribal police department serves “an area the size of Delaware, but with a population of only 10,000 that is patrolled by no more than three police officers (and as few as one officer) at any one time . . . .”\textsuperscript{130} The Senate report accompanying the TLOA notes:

Less than 3,000 [BIA] and tribal law enforcement officers patrol more than 56 million acres of Indian lands in 35 states. This total amounts to an approximate

\textsuperscript{120}. Id. at 718-19.
\textsuperscript{121}. Id. at 719.
\textsuperscript{124}. Handler, supra note 83, at 278-79.
\textsuperscript{125}. Id.
\textsuperscript{126}. Id. at 279-80.
\textsuperscript{127}. Id.
\textsuperscript{128}. See id. at 278-80.
\textsuperscript{129}. WAKELING ET AL., supra note 123, at 9.
\textsuperscript{130}. Id.
unmet staffing need of 40% when compared to similar rural communities nationwide. The unmet staffing need is far greater on some reservations.  

The report goes on to attribute the lack of police in Indian Country to “the lack of funding for BIA and tribal police officers, [and] the difficulty in recruiting, training, and retaining new police and corrections officers adds to the problem.”

The TLOA attempts to address the problems of law enforcement in a number of ways. First, it increases recruitment and retention efforts for BIA and tribal police. The Act allows BIA and tribal police to receive training at state police academies in addition to tribal, state, and local colleges where federal law enforcement training standards are met, thus significantly expanding training options for tribal officers. The Act also raises the maximum age of new recruits in order “to target retired military personnel.” This is particularly relevant since Indians serve in the military at higher rates than any other ethnic group.

The TLOA also increases tribal officers’ arrest authority on the reservation. An amendment to the Controlled Substances Act allows a tribal officer designated by the Attorney General to make a warrantless arrest if the officer has probable cause to believe the suspect committed a felony under federal law or if the officer observed the suspect commit any crime against the United States. Furthermore, the Act allows the BIA to deputize tribal police to make warrantless arrests based on probable cause of a federal crime.

Many tribal police departments have no access to criminal history records and are “severely impeded and marginalized” by their lack of access. The TLOA provides tribal police greater access to the National Criminal Information Database (“NCI Database”), which furnishes essential criminal history information when detaining or arresting a suspect, and allows officers to likewise enter information into

132. Id. at 7.
134. Id. sec. 231(a)(1), § 3(e)(1)(C), 124 Stat. at 2273 (codified at 25 U.S.C. § 2802(e)(1)(C)).
140. Hart, supra note 25, at 171.
the database.  The NCI Database “has been called ‘the single most important avenue of cooperation among law enforcement agencies.’”  Access to the NCI Database not only allows tribal police to interface with the larger law enforcement community, but also adds legitimacy to the efforts of tribal police in that community.

The TLOA takes other measures intended to incentivize increased coordination among the various police forces in and around Indian Country. For instance, the U.S. Attorney General is authorized to “provide technical and other assistance to State, tribal, and local governments that enter into cooperative agreements, including agreements relating to mutual aid, hot pursuit of suspects, and cross-deputization . . . .”

By helping tribal police departments grow, the TLOA implicitly acknowledges that tribal police, when properly empowered and funded, can be the greatest deterrent to crime in Indian Country. It is also, perhaps, a tacit admission that federal and state police efforts have failed due, in part, to poor logistics and a lack of will by nontribal police tasked with reservation law enforcement.

C. Tribal Courts

In 1993, Congress found that “tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments . . . .” Although ICRA limited tribal sentencing to no more than one-year imprisonment and $5000 in fines for any single offense, tribal court convictions can have significant long-term effects on Indian defendants. For example, convicts may be ineligible for Tribal and Section 8 housing, as well as financial aid for higher education.

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142. Hart, supra note 25, at 170-71.
144. See, e.g., id. § 202(a)(2), 124 Stat. at 2262 (codified at 25 U.S.C. § 2801 note (Supp. IV 2010) (Findings; Purposes)).
nature, offenders will be listed in the National Sex Offender Registry.\footnote{148. See Adam Walsh Child Protection and Safety Act of 2006 § 113(a), 42 U.S.C. § 16913(a) (2006).} Tribal convictions can also be considered in future state or federal sentencing as grounds to justify an upward departure from sentencing guidelines\footnote{149. See United States v. Waseta, 647 F.3d 980, 990-91 (10th Cir. 2011); see also Allen, supra note 147.} and can be considered when establishing habitual offender status.\footnote{150. See United States v. Shavanaux, 647 F.3d 993, 1000-01 (10th Cir. 2011).}

Nevertheless, the limits on sentencing greatly circumscribe Indian tribes’ ability to enforce the law, requiring them to depend on outside federal or state authorities to address any felonies or other similar crimes.\footnote{151. Handler, supra note 83, at 297-98.} One of the most discussed elements of the TLOA is the provision that increases tribal court sentencing authority—from $5000 in fines and one-year maximum imprisonment under ICRA—to $15,000 in fines and three-years imprisonment per offense where certain heightened constitutional protections are met.\footnote{152. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2261, 2279-80 (codified at 25 U.S.C. § 1302(a)-(b) (Supp. IV 2010)).} The TLOA also sets the maximum total sentence a tribal court can impose at nine-years imprisonment.\footnote{153. Id.}

Enhanced sentencing can be considered in cases where the defendant

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.\footnote{154. Id. § 234(a)(3), 124 Stat. at 2280 (codified at 25 U.S.C. § 1302(b)).}

Defense attorneys will certainly litigate what constitutes a “comparable offense.”\footnote{155. Quintin Cushner & Jon M. Sands, Tribal Law and Order Act of 2010: A Primer, with Reservations, CHAMPION, Dec. 2010, at 38, 39, 41.} In addition, the interpretation of “any of the states” may be litigated if, for instance, “a Navajo Indian defendant could face more than one-year imprisonment in a tribal court within Utah’s boundaries for activity that is only punishable by more than one-year imprisonment in Hawaii.”\footnote{156. Id. at 39.}

To invoke the enhanced sentencing available under the TLOA, tribes must provide defendants with various protections previously not required under ICRA (which governed tribal sentencing).\footnote{157. Tribal Law and Order Act of 2010 § 234(a)(3), 124 Stat. at 2280 (codified at 25 U.S.C. § 1302(b)-(c)).} Tribes are still allowed to prosecute and
sentence up to one year of imprisonment and $5000 without implementing the additional protections.\footnote{158. See id.}

Previously, defendants had the right to hire an attorney at their own expense in tribal court, but tribes were not required to provide an attorney to defendants.\footnote{159. 25 U.S.C. § 1302(6) (2006) (amended 2010).} In order to impose enhanced TLOA sentencing, defendants must be afforded “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution . . . .”\footnote{160. Tribal Law and Order Act of 2010 § 234(a)(3), 124 Stat. at 2280 (codified at 25 U.S.C. § 1302(c)).} Tribes are required to provide indigent defendants with an “attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards . . . .”\footnote{161. Id. § 234(a)(3), 124 Stat. at 2280 (codified at 25 U.S.C. § 1302(c)(2)).} The statute specifically refers to “attorney,” ruling out the possibility that lay advocates can counsel indigent defendants.\footnote{162. Id.} However, the language leaves open the possibility that the attorney could be licensed only by the tribal bar. The TLOA provides little guidance as to what “appropriate professional licensing standards” might mean in practice.\footnote{163. See id. In context, the Act reads: “(c) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

. . . .

“(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; . . . .”

Id.}

Mandating tribes to provide attorneys for indigent defendants is a significant expense to impose on Indian tribes.\footnote{164. See KATE TAYLOR, JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), available at http://www.justicepolicy.org/uploads/justice_policy/documents/system_overload_final.pdf.} Because of the extreme poverty in Indian Country,\footnote{165. Washburn, supra note 92, at 724.} a large number of defendants will require the tribe to fund their defense. Currently much of the defense work in Indian Country is provided either by lay advocates (who will not be authorized to practice at TLOA-enhanced sentencing hearings), or by Indian Legal Services (who are prohibited by Legal Services Corporations from providing legal assistance in criminal proceedings beyond misdemeanors or lesser offenses in tribal court).\footnote{166. Allen, supra note 147.} Conceivably, tribes and regional
tribal organizations might employ the economy of scale by establishing regional tribal public defenders’ offices or a fund to pay private attorneys to defend TLOA cases. In Wisconsin, for instance, Wisconsin Judicare, Inc., the Wisconsin Tribal Judges Association, and the Great Lakes Inter-Tribal Council might coordinate such an endeavor, subject to the authorization of each tribe’s individual legislative council.167

In addition to licensed defense attorneys, TLOA-enhanced sentencing requires judges to have “sufficient legal training to preside over criminal proceedings” and be “licensed to practice law by any jurisdiction in the United States . . . .”168 Interestingly, the licensing of judges is subject to much lower scrutiny than attorneys because there is no requirement that the jurisdiction apply any type of licensing standard.169 It is conceivable, therefore, that a tribal bar would be qualified to license its own judges and prosecutors to preside over TLOA-enhanced sentencing proceedings, but must use public defenders which meet higher TLOA standards.

This could be reflective of other issues, however. One concern is that requiring tribal courts to use law-trained judges may not reflect tribal values or realities.170 Currently in the Navajo Nation—considered by many to be the gold standard of tribal judiciaries, with three justices at the supreme court and seventeen judges at the district court—“only the chief justice has a law degree and is admitted to both state and tribal bars, while one of the District Court judges has a law degree and is admitted to the state bar. None of the other judges has a law degree . . . .”171

Similarly, in Wisconsin, a tribal court judge who is also an attorney is the exception to the norm.172 In fact, some tribes such as the Menominee Nation require tribal judges to be tribal members, thereby greatly limiting the pool of law-trained judges.173 The Menominee Tribal Courts are courts of general jurisdiction subject to

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169. See id.

170. Telephone Interview with Stephan Grochowski, Chief Justice, Menominee Supreme Court (Nov. 16, 2011) (“Our court was built by non-attorney judges. I am standing on their backs.”).


172. Illustrating the point, Chief Justice Grochowski said:
Oneida has eleven or twelve judicial officers and none are attorneys. Stockbridge-Munsee has four judges and only one is an attorney. Ho-Chunk has one tribal judge who is an attorney at the trial court level. In fact she is the interim chief judge. I do believe that their appellate level has at least two attorney judges.

Telephone Interview with Stephan Grochowski, supra note 170.

the appellate review of the Menominee Supreme Court.\footnote{174}{Id. § 1(b)-(c).} Under the Menominee constitution, the Menominee Supreme Court should have three justices.\footnote{175}{Id. § 1(b).} As of November 2011, it lacks one justice.\footnote{176}{Telephone Interview with Stephan Grochowski, supra note 170.} Tribal court rules call for at least two justices to serve on the appellate level.\footnote{177}{MENOMINEE INDIAN TRIBE, TRIBAL JUDICIARY & INTERIM LAW & ORDER CODE § 1-2-3 (1999).} If only two justices sit and are divided in their decision, the lower court decision stands.\footnote{178}{Id.} Of the judges in the Menominee Nation, only the chief justice and a part-time associate justice are licensed attorneys.\footnote{179}{Telephone Interview with Stephan Grochowski, supra note 170.} Therefore, there are insufficient law-trained judges to preside over even one case, let alone an appeal.\footnote{180}{See id.} When one considers the probability of judicial recusal of a judge in a small community like the Menominee,\footnote{181}{Often all trial level judges are at least distantly related to a defendant, and the judge with the least conflict must take the case. Lorena Thoms, Tribal Judge, Menominee Tribal Courts, Comment at a Meeting Regarding a Draft Recusal Policy (June 21, 2011).} the number of legally trained judges available to implement TLOA-enhanced sentencing plummet.

The lack of law-trained judges thus poses a problem for those tribes wishing to use the heightened sentencing available under the TLOA. Mutual respect between tribes and principles of comity, however, make the shared use of law-trained judges a feasible and practical solution. In Wisconsin, for instance, the Menominee Nation borrows judges from other tribes through the Wisconsin Tribal Judges Association, although the Menominee (and perhaps other tribes) do not have a specific constitutional or regulatory provision authorizing the practice.\footnote{182}{See MENOMINEE INDIAN TRIBE CONST. & BYLAWS; MENOMINEE INDIAN TRIBE, TRIBAL JUDICIARY & INTERIM LAW & ORDER CODE. But see Menominee Indian Tribe, Amendment to Tribal Ordinance No. 79-14, Tribal Judiciary & Interim Law & Order Code (Aug. 19, 1999) (repealing MENOMINEE INDIAN TRIBE, TRIBAL JUDICIARY & INTERIM LAW & ORDER CODE § 1-2-3(3), which authorized the practice of borrowing judges from other tribes, and commenting that “[t]he Menominee Constitution and By-Laws sets the eligibility requirements for judges and does not permit appointment of outside ineligible judges to sit on the Tribal Court”).} A potential danger arises that judgments will be open to criticism if a particular judge is unfamiliar with practice in another tribe because each tribe is a separate nation with its own laws and procedures. Nevertheless, it is currently a common and effective practice in Wisconsin for tribal judges to sit in other jurisdictions when there is a need, because justice demands that every person have the right to an appeal.\footnote{183}{Interview with Stephan Grochowski, Chief Justice, Menominee Supreme Court, in Keshena, Wis. (June 30, 2011).}
Tribes must be careful when considering if and how to move forward with TLOA-enhanced sentencing, especially if they do not exclusively use state-licensed attorneys. For example, “[u]nder the enhanced system, if judges or defense counsel without law degrees aren’t felt to have the right credentials or experience while, at the same time, three-year sentences are being handed down, verdicts may be thrown out en masse on appeal, essentially ending the new law.”

Tribes are also required to “make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government,” and criminal proceedings must be recorded. At least one tribe has opted not to exercise its enhanced sentencing authority because of this provision. The tribe is concerned that adopting formal rules of procedure and evidence will diminish member access to the justice system. If formal rules were instituted, members (as in state and federal courts) would be forced to rely on lawyers and lay advocates with the specialized skills to help them navigate the system.

The TLOA may likewise provide another challenge to tribes that wish to exercise the enhanced authority. In particular, many tribal laws have yet to be codified, particularly with regard to customary law. They are instead a series of resolutions passed by a legislative council. In Menominee, for instance, resolutions are generally posted for a designated period of time and then stored somewhere in the tribal offices where members can access them by going through a clerk or other tribal employee. Often, there is no official notice of new ordinances beyond the designated posting period and even tribal prosecutors are not notified when new rules have been enacted. Many tribes will thus have to find a way to amend current procedures to ensure that all criminal laws are publicly available or face possible reversal of any enhanced sentencing.

Even within a court system offering enhanced TLOA protections and administering enhanced sentences, tribes are still allowed to sentence defendants to

184. Berry, supra note 171.
187. Id.
189. Interview with Danica Zawieja & Colleen Fenn, Assistant Tribal Prosecutors, Menominee Indian Tribe, in Keshena, Wis. (July 15, 2011).
190. Id.
one-year imprisonment and $5000 under ICRA without providing additional protections. Thus, in tribal courts that utilize the enhanced sentencing provisions of the TLOA, two classes of crimes requiring two different levels of constitutional protections are created: ICRA crimes with a maximum sentence of one-year imprisonment and $5000; and TLOA crimes with the possibility of up to three-years imprisonment and $15,000. This means that tribes can continue to prosecute crimes as they have been doing, only exercising their enhanced sentencing authority in a limited capacity.

In addition to the heightened sentencing authority, other provisions act to enhance the effectiveness of tribal courts. One easily overlooked provision of the TLOA states simply: “DEFINITION OF OFFENSE.—In this section, the term ‘offense’ means a violation of a criminal law.” This amends ICRA to effectively overrule Spears v. Red Lake Band of Chippewa Indians and the prohibition of sentence “stacking.” Stacking occurs when a court charges multiple offenses regarding the same incident in order to increase the defendant’s sentence. The Indian Civil Rights Act provided, “[n]o Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both . . . .” The Spears court interpreted this language to mean “that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes.” Thus, under Spears, a defendant can only face up to one year of incarceration for all crimes involved in “a single criminal episode.”

By defining an “offense” as “a violation of a criminal law,” Congress made its intent clear that a defendant may be sentenced up to nine years total, the sentencing maximum, for each separate crime. Thus, this amendment to the ICRA sanctions “stacking” under both ICRA sentencing and TLOA-enhanced sentencing. The rule has already been challenged in Miranda v. Anchondo in which the defendant was sentenced to 910 days imprisonment under ICRA for eight criminal violations arising

192. See id.
193. Id. § 234(a)(3), 124 Stat. at 2281 (codified at 25 U.S.C. § 1302(e)).
195. See, e.g., id. at 1177 (noting that the defendant was charged before the Red Lake Tribal Court with six separate counts, all arising from a single drunk-driving incident: “(1) negligent homicide; (2) driving under the influence of alcohol (‘DUI’); (3) failing to take a blood, breath, or urine test; (4) failing to stop at the scene of a traffic accident; (5) driving without a license; and (6) a liquor violation”).
197. Spears, 363 F. Supp. 2d at 1180.
from a single criminal transaction. The Ninth Circuit upheld the sentence, stating that the amended statute “unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation . . . .”

Meanwhile, tribal jails are already overcrowded and enhanced prison sentences increase the need for jails and prisons to hold Indian offenders. The TLOA provides funding to tribes to build and maintain tribal jails and justice centers, and regional intertribal long-term detention centers. It also funds tribes who are “developing and implementing alternatives to incarceration in tribal jails . . . .” The TLOA also initiates the Bureau of Prison Tribal Prisoner Pilot Program, a four-year pilot program under which up to 100 tribal prisoners with sentences of at least two years will be housed in federal prisons. Finally, the Attorney General, within a year of the enactment of the TLOA, must submit a plan to address the problem of incarceration in Indian Country “in coordination with the Bureau of Indian Affairs and in consultation with tribal leaders, tribal law enforcement officers, and tribal corrections officials.” These steps, taken together, and especially the commitment to creating a long-term plan, give hope that tribes will have the resources to house offenders as they move forward with heightened sentencing authority.

Tribes and tribal courts, however, are cautioned to proceed carefully as they implement these provisions of the TLOA. Troy Eid, a former U.S. Attorney, is part of a nine-member Indian Law and Order Commission tasked with conducting “a comprehensive study of law enforcement and criminal justice in tribal communities” as created by the TLOA. He cautions that “[t]ribes should remember that their

199. 654 F.3d 911, 913, 918 (9th Cir. 2011).
200. Id. at 918.
201. Todd D. Minton, Bureau of Justice Statistics, U.S. Dep’t of Justice, Ser. No. NCJ 228271, Jails in Indian Country, 2008, at 1 (2009), available at http://www.bjs.gov/content/pub/pdf/jic08.pdf (stating that thirty-six of sixty-eight tribal jails surveyed were over capacity at some point in 2008, and sixteen of the sixty-eight were over capacity on an average day).
203. Id. (codified at 42 U.S.C. § 13709(b)(1)(C)).
204. Id. (codified at 42 U.S.C. § 13709(b)(1)(A)(iii)).
207. Tribal Law and Order Act of 2010 § 244(b)(3), 124 Stat. at 2295 (codified at 42 U.S.C. § 13709(d)).
208. See id. § 244(b)(1), 124 Stat. at 2294 (codified at 42 U.S.C. § 13709(b)(1)(A), (C)).
implementation of the Tribal Law and Order Act could affect others—it should be done thoughtfully and carefully.\textsuperscript{210}

D. Crime Prevention

In addition to policing and prosecution, the TLOA addresses prevention by authorizing and improving social programs in three key areas: (1) alcohol and substance abuse; (2) opportunities for at-risk Indian youth; and (3) violence against women and girls in Indian Country.\textsuperscript{211}

1. Alcohol and Drug Abuse

Addressing alcohol and drug abuse among members is one of the most pressing problems in Indian Country today. The rate of alcohol-related deaths among Native Americans is “seven times that of the general population,” and among youth aged fifteen to twenty-four, the rate is twelve times that of the general population.\textsuperscript{212} According to the National Survey on Drug Use and Health, substance abuse is more common among Native Americans than any other demographic group.\textsuperscript{213} Further, the link between excessive alcohol use and both violent and nonviolent Indian crime is well documented.\textsuperscript{214} Alcohol is involved in ninety percent of all homicides involving indigenous people.\textsuperscript{215} In order to address crime and lawlessness in Indian Country, the problem of substance abuse must be met head on.

With respect to substance abuse on the reservation, the TLOA reauthorizes\textsuperscript{216} the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (“IASA”).\textsuperscript{217} The IASA provides grants for running summer youth programs, developing tribal juvenile codes, and constructing shelters, detention centers, and

\textsuperscript{210} Berry, supra note 171.
\textsuperscript{212} Larry Gould, Alcoholism, Colonialism, and Crime, in NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 87, 87 (Jeffrey Ian Ross & Larry Gould eds., 2006).
\textsuperscript{214} Gould, supra note 212, at 95.
\textsuperscript{215} Id. at 96.
\textsuperscript{216} Tribal Law and Order Act of 2010 § 241, 124 Stat. at 2287-92.
treatment centers for at-risk youth and juvenile offenders. It also provides training of federal and tribal law enforcement in the investigation and prosecution of offenses relating to illegal narcotics, as well as alcohol and substance abuse prevention and treatment, especially with regard to youth. The Act further creates the Office of Indian Alcohol and Substance Abuse in the federal Substance Abuse and Mental Health Services Administration to coordinate agency efforts. A focus on substance abuse rehabilitation addresses the root cause of crime rather than simply punishing the criminal. The hope is that offenders who address their substance abuse issues are less likely to reoffend and more likely to contribute to their communities in a meaningful way.

2. Juvenile Crime

Youth crime, especially gang activity, is another contributor to lawlessness on the reservations. Native American gang members often act with impunity, believing that “little or no consequence for criminal behavior will occur at the tribal court level.” Many of the TLOA provisions that strengthen tribal courts and tribal law enforcement will help change negative perceptions about the effectiveness of tribal agencies. In addition, much of the substance abuse prevention effort is especially directed at tribal youth.

To directly address juvenile crime, the TLOA creates the Tribal Youth Program (“TYP”), which provides competitive grants to tribes that respond to juvenile delinquency. It “authorize[s] $25 million annually through 2015 for juvenile

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224. See id. § 241(b), 124 Stat. at 2289-90 (codified at 25 U.S.C. § 2432(a) (Supp. IV 2010)).
225. Id. § 246(a)(2), 124 Stat. at 2295-96 (codified at 42 U.S.C. § 5783(d) (Supp. IV 2010)).
delinquency prevention services and the care of juvenile offenders.\textsuperscript{226} In awarding the grants, the TYP will consider a tribe’s juvenile crime rates, dropout rates, and the number of at-risk youth.\textsuperscript{227}

The TLOA also adds a member to the Coordinating Council on Juvenile Justice and Delinquency Prevention, appointed by the Chairman of the Committee on Indian Affairs of the Senate.\textsuperscript{228} Presumably this member will represent the concerns of Native nations with regard to juvenile crime. The Act also provides grants for guardians ad litem and court-appointed special advocates for children and youth.\textsuperscript{229} Finally, the Act develops and provides funding for Indian juvenile detention and substance abuse treatment centers.\textsuperscript{230} By properly addressing juvenile crime and providing offenders proper rehabilitation, Congress has taken steps that may prevent juvenile offenders in Indian Country from becoming adult offenders.

3. Crimes Against Women

Indian women are victim to a stomach-turning epidemic of violent crime.\textsuperscript{231} Over one-third of Indian women will be raped or sexually assaulted in their lifetimes.\textsuperscript{232} Of those crimes, eighty-six percent will be committed by non-Indians over whom the tribes have no criminal jurisdiction.\textsuperscript{233} Another thirty-nine percent of Indian women will face domestic violence, often from their spouse or intimate partner, many of whom are non-Indian.\textsuperscript{234} Involving both young and old males “in stopping the violence against women and girls is an important step to ending it everywhere, giving youth a chance to change their own futures.”\textsuperscript{235}
Subtitle F of the TLOA is named Domestic Violence and Sexual Assault Prosecution and Prevention. This section takes a number of steps to address violence against women. Specifically, tribes now receive notice that a prisoner on supervised release is moving to their jurisdiction, just as other nontribal municipalities are afforded similar notice. This allows tribal police to take proactive steps when an abuser or other violent offender enters or returns to the community.

The TLOA also attempts to increase the number of sexual assault convictions in Indian Country. Federal employees serving in Indian Country, particularly those in health services, are now required to testify in tribal or state court regarding information gained in the scope of their duties. The TLOA also increases training for federal and tribal prosecutors in the handling of domestic and sexual violence crimes in Indian Country, including interviewing witnesses and handling evidence “to increase the conviction rate for domestic and sexual violence offenses for purposes of addressing and preventing domestic and sexual violent offenses.” Better training may discourage federal prosecutors from declining cases by increasing their confidence in obtaining a conviction. The Act commissions a study of the current capabilities of Indian Health Service facilities in remote Indian reservations and Alaska Native villages to “collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution” and asks for recommendations to improve those capabilities. Increased convictions prevent domestic violence from escalating, breaking the cycle of violence by removing the offender and protecting the victim, and thus may have a deterrent effect in other households.

The TLOA also includes specific measures to help victims. It increases agency cooperation and focuses Indian victim services and Indian victim advocate training on efforts to combat sex trafficking. It requires the Indian Health Service to develop standardized sexual assault policies and protocol to better serve victims.


237. Id. § 261, 124 Stat. at 2299 (codified at 18 U.S.C. §§ 4042, 4352(a), which previously did not require notice to tribal jurisdictions).

238. See id.


240. Id. § 262, 124 Stat. at 2299 (codified at 25 U.S.C. § 2802(c)(9)).


242. Id. § 264, 124 Stat. at 2300 (codified at 42 U.S.C. § 14044 note (Supp. IV 2010) (Recommendations to Prevent Sex Trafficking of Indian Women)).

E. The TLOA on P.L. 280 Reservations

The TLOA includes two provisions designed to improve conditions in P.L. 280 states. First, the U.S. Attorney General is authorized to provide technical and other assistance to state and local law enforcement agencies that enter into cooperative agreements with tribes to investigate and prosecute crimes. By making funding contingent on these cooperative agreements, this provision institutes two commonly cited solutions to problems caused by P.L. 280: concurrent tribe-state jurisdiction through cooperative agreements in P.L. 280 states, and additional federal funding for state law enforcement efforts in Indian Country. The TLOA thus encourages cooperation and coordination among the various jurisdictional stakeholders by providing funding for states to fulfill their law enforcement responsibilities in Indian Country.

The TLOA also authorizes the federal government to reassert jurisdiction over P.L. 280 tribes at the discretion of the U.S. Attorney General without requiring approval from the state. As one commentator asserts, “this provision may prove to be one of the most important in the entire TLOA, as it could potentially place large areas of Indian Country back under federal protection for the first time since 1953.” However, the new federal jurisdiction will not supplant state P.L. 280 jurisdiction. Rather, the federal government will share concurrent jurisdiction with the state, adding another jurisdictional layer to the already overly complicated scheme. In some cases, the federal government, the state, and the tribe will all have jurisdiction over a single offense.

In order for this provision to be effective, tribes must be convinced that it is in their best interests. Given the abysmal record of federal law enforcement, tribes may be skeptical that adding the federal government to the jurisdictional scheme will be an improvement. In an informal survey of ten Wisconsin P.L. 280 tribal prosecutors, none were interested in implementing this part of the TLOA. To be sure, this was

244. Id. § 222, 124 Stat. at 2272 (codified at 25 U.S.C. § 2815 (Supp. IV 2010)).
246. Id. at 699.
249. Hart, supra note 25, at 170.
251. Id. § 221(b), 124 Stat. at 2272 (codified at 18 U.S.C. § 1162(d) (Supp. IV 2010)).
252. Informal Survey of Various Tribal Representatives by Indian Law Office, Wis. Judicare,
not motivated by satisfaction with the status of Wisconsin’s law enforcement on the reservations, but by general distrust of the federal government and disbelief that federal intervention will improve the situation. 253 One attorney described it as “‘the devil you know’ mentality.” 254 In other words, the devil you know (the state) is better than the devil you don’t (the federal government).

If some of the other provisions or future legislative efforts greatly improve federal law enforcement in Indian Country, then more tribes will certainly reconsider this option. In jurisdictions where state enforcement is particularly ineffective, allowing the federal government into the jurisdictional mix might be more appealing. The White Earth Nation in Minnesota, a mandatory P.L. 280 state, has already petitioned the federal government to reassume jurisdiction on its reservation. 255 Arguably, tribes need not apply for the U.S. government to assume jurisdiction over all major crimes. 256 Initially, the DOJ claimed tribes could apply for federal jurisdiction over certain crimes or a limited geographical area in order to test the federal capabilities and commitment. 257

Inc. (2011) (survey results documented by David Armstrong, Staff Att’y, Indian Law Office, Wis. Judicare, Inc.). Wisconsin Judicare provides legal aid to northern Wisconsin. WIS. JUDICARE, INC., supra note 167. Its Indian Law Office provides legal services to income-eligible tribes and tribal members. Id.

253. Informal Survey of Various Tribal Representatives, supra note 252.


Section 221 does not expressly require Indian tribes to request that the United States accept concurrent jurisdiction to prosecute “all” violations of the General Crimes and Major Crimes Acts within the tribe’s Indian country. To the contrary, the statute provides that those two Acts “shall apply in the areas of the Indian country of the Indian tribe” only “at the request of” the tribe and “after consultation with and consent by the Attorney General.”

Id. (quoting 18 U.S.C. § 1162(d) (Supp. IV 2010)). Although this language was removed, the final rule still asserts, “it is unnecessary, under the Department’s view of the applicable statutes, for tribes in ‘optional’ Public Law 280 jurisdictions to submit individual requests for formal acceptance of concurrent Federal criminal jurisdiction.” Office of the Attorney General; Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,038 (Nov. 28, 2011) (to be codified at 28 C.F.R. pt. 50).

257. Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. at 29,677. The Department of Justice retreated from this position in the final rule, citing two reasons: first, “such an interpretation does not have sufficient support in the language or legislative history of the TLOA,” and second, “such partial jurisdiction could create practical
III. A WAY FORWARD

The TLOA is not a panacea for lawlessness in Indian Country and many tribes will be reluctant to utilize some of its provisions. Some will see the TLOA as an opportunity for tribes to learn from the mistakes of the American judicial system and create something better; something more effective and more responsive to the needs of the community. This echoes one of the constitutional ideals of federalism, wherein the states act as laboratories for public policy and, through experimentation and trial-and-error, produce practices to be adopted by other states with similar needs.

The White Earth Nation in Minnesota is the first tribe to petition the federal government to reassume jurisdiction on its reservation. While other tribes may reject this option out of distrust for the federal government, concern regarding already complicated jurisdictional schemes, or distaste for certain provisions of the TLOA, the White Earth Nation presents a powerful vision of tribal sovereignty effectuated by utilization of TLOA provisions.

Attorney Jim Schlender, while acknowledging that the “boots on the ground details” have not all been worked out, presents a powerful picture of a tribal criminal justice system. His is one in which the tribal system is empowered by the TLOA and deals with offenders directly, from arrest to rehabilitation, and then to reentry. In this vision, tribal police officers arrive at a crime scene. Because they are federally deputized, they can arrest any offenders, Indian or non-Indian. They then report the incident to the tribal prosecutor who has been deputized as a Special Assistant U.S. Attorney. The prosecutor evaluates the situation, and based on the criminal acts and the Indian status of any offenders, determines whether to charge them in difficulties, complicating further the complex criminal jurisdiction of Federal Indian law.”


258. Berry, supra note 2 (“Tribes weighing costs and benefits include one Michigan tribe that commissioned a study of TLOA and reportedly may decide it’s not for them. The Northern Ute Tribe in Utah rejected cross-deputizing or other involvement by state officials on tribal lands.”).

259. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’” (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

260. Gunderson, supra note 255.

261. Interview with Jim Schlender, Jr., supra note 5.


263. Id. § 213(a)-(b), 124 Stat. at 2268 (codified at 25 U.S.C. § 2810(a) (Supp. IV 2010), and 28 U.S.C. §§ 543(a), (c) (Supp. IV 2010)).
tribal court or with his federal authority. He or she may also decide that the tribe does not have the jurisdiction, capacity, or desire to prosecute a particular case and can refer it to the county or the regular federal prosecutors. In this scenario, it is the tribal prosecutor who lives and works in the community that exercises prosecutorial discretion, rather than a federal prosecutor who works hundreds of miles away. The tribal prosecutor will not be forced to overcharge based on guidelines written by “tough-on-crime” politicians. Instead, the tribal prosecutor will be able to best serve the tribal community by exercising his or her own judgment.

If the offender is charged in tribal court, he or she will be provided a public defender before an impartial law-trained tribal judge and face up to nine years of incarceration. Even if the offender is charged with a federal crime, under the TLOA the trial may be held on the reservation and the tribal prosecutor may act as the federal prosecutor. In addition to increased fines and incarceration, the tribal judge and prosecutor will have alternative and traditional methods of dealing with offenders at their disposal. They may have juvenile diversionary programs or drug courts. They may utilize restorative justice or traditional peacemaking principles. They can sanction tribal members by suspending their treaty harvesting rights for deer, fish, or

265. Interview with Jim Schlender, Jr., supra note 5; see also Tribal Law and Order Act of 2010 § 213, 124 Stat. at 2268-69 (codified at 25 U.S.C. § 2810, and 28 U.S.C. §§ 543(a), (c)).

266. Interview with Jim Schlender, Jr., supra note 5.

267. See id.


269. Id. § 213(a)(1), 124 Stat. at 2268 (codified at 28 U.S.C. § 543(a), (c)).

270. Indian Tribal Justice Act § 2(7), 25 U.S.C. § 3601(7) (2006) (“Traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes . . . .”). It is important to note the difference between alternative and traditional sanctions. Tribes are striving to harmonize traditional and modern practices, but much of what is alternative is not traditional. Harmony will inevitably vary from tribe to tribe.


They can banish an offender in whole or in part, or even by disenrolling the offender.

For those offenders who are incarcerated, tribes may seek funds to build and operate long-term incarceration units so Indian offenders can serve all or part of their time on the reservation. Indeed, the White Earth Nation envisions a robust rehabilitation program so that Indian offenders reenter society with the skills and the outlook necessary to be productive members of the community. Under this vision, the entire criminal justice process, from arrest to reentry, is administered and controlled by the tribe.

In the final analysis, tribes cannot count on the federal government to address the crime epidemic on their reservations. While the TLOA and other federal action can help, it is ultimately the tribes’ responsibility to keep Indians safe on their land. Tribes should effectively exercise their inherent sovereignty and use their resourcefulness in implementing the TLOA to make it best serve the needs of their community. Moving forward, they should work to set the agenda for future legislation through educational efforts and focused lobbying aimed at Congress, government officials, and the public.

Felix Cohen’s miner’s canary has stopped singing, but it is not quite dead. It senses the danger—“the shifts from fresh air to poison gas in our political atmosphere . . . .” We must examine our modern treatment of the Indians and fearlessly ask ourselves what it says about us as a people and as a nation. The Tribal Law and Order Act allows the canary a small breath of fresh air but, without question, more is required if we are to breathe life into the canary and revive our “democratic faith.”

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273. See, e.g., Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) (holding that tribes have the authority to regulate treaty fishing rights).

274. For example, by banning the member from the tribe’s casino.

275. See Patrice H. Kunesh, Banishment as Cultural Justice in Contemporary Tribal Justice Systems, 37 N.M. L. Rev. 85 (2007) (providing an in-depth discussion of banishment and disenrollment); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.36, (1978) (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”).

276. ECHO-HAWK, supra note 1, at 13 (“The widespread lack of reliable information about Native issues is the most pressing problem confronting Native Americans in the United States today.”).


278. Id.